

Synopsis of Contemporary Reports

1927—1934

ALL INDIA REPORTER

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Synopsis of Contemporary Reports

1914—1925

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THE ALL INDIA REPORTER

1916

BOMBAY SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE BOMBAY HIGH COURT
REPORTED IN

- (1) I. L. R. 40 BOMBAY (2) 18 BOMBAY LAW REPORTER
(3) 17 CRIMINAL LAW JOURNAL (4) 32 TO 36 INDIAN CASES

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1916

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Puisne Judges :

The Hon'ble Sir S. L. Batchelor, Kt.

„ „ Dinsha D. Davar, Kt.

„ Mr. F.C.O. Beaman,

„ Sir J.J. Heaton, Kt.

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22	" " 126	158	1916 " 261	213	1916 " 223	446	" " 298	588	" " 258
28	" " 228	166	1915 " 197	321	" " 305	461	1915 " 273	598	1917 " 288
34	" " 214	186	" " 265	329	" " 262	473	1916 " 227	600	1916 " 129
51	" " 242	189	" " 125	233	" " 217	477	" " 66	606	" " 273
55	" " 262	194	" " 208	337	" " 272	483	" " 108	614	" " 318
60	" " 226	200	" " 227	341	1915 " 267	492	" " 99	621	" " 206
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69	" " 109	210	" " 222	358	" " 255	509	" " 200	638	" B 209
74	" " 229	220	" " 249	369	" " 283	513	" " 196	646	" " 302
86	" " 269	235	" " 134	378	" " 215	517	" " 202	655	" " 264
97	" " 203	239	1916 " 300	386	" " 125	529	" " 268	662	" " 277
105	" " 213	248	" " 278	392	" " 296	541	" " 265	666	" " 315
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22	" " 217	217	" " 315	446	" " 100	683	" " 221	838	1916 PC 126
27	" " 275	230	" " 164	450	" " 105	686	" " 178	846	" " 14
33	" " 278	243	" " 296	455	" " 95	689	" " 294	850	" " 18
38	" " 305	247	" " 206	460	" " 188	693	" " 198	856	" " 117
45	" " 310	250	" " 215	469	" " 66	695	" " 197	862	" " 169
52	" " 262	258	" " 210	475	" " 99	700	" " 302	868	" " 110
57	" " 227	266	" " 229	481	" " 200	708	" " 264	878	" " 123
60	" " 225	284	" " 218	486	" " 307	712	" " 277	884	" " 89
65	" " 222	289	" " 220	490	" PC 256	715	" " 167	900	" " 20
67	" " 272	292	" " 279	509	" " 147	740	" " 312	904	" " 41
70	" " 283	296	" " 298	516	" B 136	744	" " 206	909	" " 16
76	" " 228	308	1915 PC 79	521	" " 144	751	" " 153	915	1917 B 182
80n	" " 202	315	" " 48	532	" " 4	757	" " 204	934	1916 " 135
81	" " 255	323	1916 B 290	553	1917 " 288	763	" " 199	940	" " 98
90	" " 237	335	" " 281	554	1916 " 122	766	" " 315	943	" " 101
96	" " 268	340	" " 196	556	" " 64	768	" " 273	946	" " 103
105	" " 251	343	" " 202	559	" " 125	773	" " 318	950	" " 143
118	" " 258	347	1915 PC 101	563	" " 150	779	" " 166	954	" " 85
124	" " 214	355	" " 39	571	" " 57	782	" " 179	973	" " 125
126	" " 265	360	" " 33	579	" " 107	786	" " 138	976	" " 59
134	" " 239	372	" " 37	582	" " 129	789	" " 313	980n	1917 " 287
156	" " 257	378	" " 115	587	" " 77	793	" " 191	982	1916 " 147
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188	" " 260	408	" " 113	642	1916 " 202	806	" " 158	1022	" " 148
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FB	19 BLR 100	55	39 IC 88	65	40 IC 1002	96	39 IC 203
	41 Bom 438		19 BLR 112		19 BLR 545		19 BLR 60
4	37 IC 271		41 Bom 402		41 Bom 546		18 Cr L J 463
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9	39 IC 807	59	40 Bom 557		40 Bom 477		18 Cr L J 468
	19 BLR 211		38 IC 838	68	38 IC 552		98 (1)37 IC 305
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48	39 IC 298		41 Bom 170		41 Bom 315		18 Cr L J 97
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99	40 Bom	492	150 18 B L R	503	202 (1) 18 B L R	80n	264 18 B L R
100	37 I C	209	40 Bom	541	202 (2) 35 I C	16	40 Bom
	18 B L R	446	153 36 I C	439	18 B L R	343	265 33 I C
101	38 I C	9	41 Bom	15	40 Bom	513	18 B L R
	18 B L R	943	18 B L R	751	204 36 I C	443	40 Bom
	41 Bom	70	155 36 I C	805	40 Bom	679	268 32 I C
103	38 I C	14	41 Bom	40	18 B L R	757	18 B L R
	18 B L R	946	18 B L R	821	206 (1) 34 I C	406	40 Bom
	41 Bom	89	157 36 I C	800	18 B L R	247	272 32 I C
104	39 I C	96	41 Bom	36	40 Bom	397	18 B L R
	19 B L R	97	18 B L R	818	206 (2) 36 I C	539	40 Bom
	41 Bom	372	158 (1) 36 I C	577	40 Bom	621	273 36 I C
105	37 I C	291	41 Bom	47	13 B L R	744	18 B L R
	18 B L R	450	18 B L R	796	209 34 I C	515	40 Bom
106	38 I C	881	17 Cr L J	529	40 Bom	638	275 33 I C
	19 B L R	83	158 (2) 36 I C	613	18 B L R	201	18 B L R
	41 Bom	367	41 Bom	31	210 34 I C	423	277 36 I C
107	37 I C	221	18 B L R	806	40 Bom	429	18 B L R
	18 B L R	579	159 36 I C	715	18 B L R	253	40 Bom
	40 Bom	564	41 Bom	5	214 33 I C	366	278 33 I C
108	37 I C	295	18 B L R	810	18 B L R	124	18 B L R
	18 B L R	433	163 33 I C	633	215 34 I C	414	40 Bom
	40 Bom	483	41 Bom	1	40 Bom	378	279 34 I C
109	39 I C	65	18 B L R	185	18 B L R	250	18 B L R
	19 B L R	117	17 Cr L J	153	217 33 I C	232	281 34 I C
	41 Bom	408	164 34 I C	525	18 B L R	22	40 Bom
119	38 I C	873	41 Bom	119	40 Bom	333	18 B L R
	19 B L R	86	18 B L R	230	218 34 I C	969	282 36 I C
122	37 I C	489	166 36 I C	562	18 B L R	234	18 B L R
	18 B L R	554	41 Bom	23	17 Cr L J	249	283 32 I C
	18 Cr L J	137	18 B L R	779	220 34 I C	973	18 B L R
123	39 I C	61	167 36 I C	227	18 B L R	289	40 Bom
	19 B L R	147	41 Bom	687	17 Cr L J	253	287 33 I C
	41 Bom	384	18 B L R	715	221 35 I C	825	18 B L R
125 (1)	38 I C	359	178 35 I C	809	18 B L R	683	290 34 I C
	18 B L R	973	41 Bom	631	17 Cr L J	393	18 B L R
	41 Bom	166	18 B L R	686	222 33 I C	320	294 35 I C
125 (2)	37 I C	140	17 Cr L J	377	18 B L R	65	18 Bom
	18 B L R	559	179 36 I C	627	17 Cr L J	144	296 34 I C
	40 Bom	386	41 Bom	64	223 33 I C	267	40 Bom
127	39 I C	83	18 B L R	732	18 B L R	8	18 B L R
	19 B L R	141	180 33 I C	694	40 Bom	313	298 34 I C
	41 Bom	377	41 Bom	312	225 32 I C	925	40 Bom
129	37 I C	215	18 B L R	198	18 B L R	60	18 B L R
	18 B L R	582	181 36 I C	618	227 32 I C	918	300 33 I C
	40 Bom	600	41 Bom	719	40 Bom	473	18 B L R
130	39 I C	23	41 B L R	798	18 B L R	57	40 Bom
	19 B L R	69	183 34 I C	529	228 33 I C	146	302 35 I C
	41 Bom	347	41 Bom	49	18 B L R	76	40 Bom
132	38 I C	717	18 B L R	206	229 34 I C	976	18 B L R
	19 B L R	186	188 37 I C	363	18 B L R	266	305 33 I C
135	37 I C	306	18 B L R	460	17 Cr L J	256	18 B L R
	18 B L R	934	191 36 I C	578	237 32 I C	938	40 Bom
	18 Cr L J	98	41 Bom	27	18 B L R	90	307 36 I C
	41 Bom	152	18 B L R	793	239 33 I C	396	18 B L R
136	37 I C	263	17 Cr L J	530	18 B L R	134	40 Bom
	18 B L R	516	193 33 I C	724	251 33 I C	353	310 33 I C
138	37 I C	22	41 Bom	390	18 B L R	105	18 B L R
	18 B L R	786	18 B L R	190	40 Bom	570	40 Bom
	40 Bom	675	196 (1) 34 I C	21	255 32 I C	933	312 36 I C
139	39 I C	17	40 Bom	509	40 Bom	358	40 Bom
	19 B L R	67	18 B L R	340	18 B L R	81	18 B L R
	41 Bom	163	196 (2) 35 I C	815	258 33 I C	362	313 36 I C
140	38 I C	773	18 B L R	682	18 B L R	118	18 B L R
	19 B L R	167	17 Cr L J	383	40 Bom	588	18 B L R
143	38 I C	54	197 35 I C	860	260 33 I C	642	17 Cr L J
	18 B L R	950	18 B L R	695	18 B L R	188	315 (1) 36 I C
	41 Bom	159	198 35 I C	871	17 Cr L J	162	40 Bom
144	37 I C	258	18 B L R	693	261 33 I C	264	18 B L R
	18 B L R	521	199 36 I C	517	18 B L R	1	18 B L R
	41 Bom	566	18 B L R	763	40 Bom	158	315 (2) 34 I C
147	37 I C	666	200 36 I C	369	262 33 I C	956	18 B L R
	18 B L R	982	40 Bom	504	18 B L R	52	318 36 I C
	41 Bom	76	18 B L R	481	40 Bom	929	40 Bom
150	37 I C	186	202 (1) 33 I C	137	264 36 I C	72	18 B L R

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BOMBAY HIGH COURT

A. I. R. 1916 Bombay 1
Full Bench

SCOTT, C. J., BATCHELOR, HEATON,
SHAH AND MARTEN, JJ.

Bapu Apaji Potdar—Defendant—Appellant.

v.

Kashinath Sadoba Gulmire—Plaintiff
—Respondent.

Second Appeal No. 769 of 1914, Decided on 22nd December 1916, from decision of First Class, Sub-Judge, Sholapur, in Appeal No. 232 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 54—Agreement of sale enforceable and vendee willing to perform it is good defence to suit for possession by vendor—*Quaere*: whether in such suit Court can decree specific performance.

Where a plaintiff seeks to recover possession of certain immovable property on the ground that he is the owner thereof, it is a valid defence to the suit that he has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific performance, but there being no registered conveyance passing the property to the defendant, possession having been taken by the latter under the agreement for sale and he being willing to perform his part of it with the plaintiff. : 40 Bom 498, Ref. [P 2 C 2]

Quaere.—Whether in such a suit it is open to a Court to decree specific performance against the plaintiff vendor. [P 4 C 1]

(b) Transfer of Property Act (4 of 1882), Ss. 54 and 55—Scope—S. 54 should be read with S. 55—Obligation attached to agreement of sale enforceable against vendor or his transferee with notice is of fiduciary nature and can be enforced as against trustee—Vendor seeking ejectment of his vendee repudiated the fiduciary obligation attached to enforceable contract of sale—Court cannot help him to recover possession as it will amount to breach of trust—Vendee is not in such case trespasser.

Section 54, T. P. Act, cannot be read by itself and does not exhaust the relations which flow from a contract for sale of immovable property according to Indian Statute Law. S. 55 imposes

many obligations on the vendor and gives corresponding rights to the purchaser. [P 2 C 2]

Obligations arising out of contract attaching to a transferee with notice as annexed to the ownership of the property transferred attach also to his transferor. [P 3 C 1, 2]

The obligation of which a person who has contracted to buy immovable property has the benefit and which he may enforce against the vendor or his transferee with notice, is of a fiduciary nature and can be enforced as though the person bound were a trustee. [P 3 C 2]

Where therefore a vendor, who has contracted to sell property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property and seeks to treat the vendee as a trespasser. [P 3 C 2]

Therefore the Court will not grant him the relief which he seeks, for it will not aid him in committing a breach of trust. [P 3 C 2]

In such a case the defendant is not a trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out. [P 3 C 2]

P. B. Shingne—for Appellant.

V. D. Limaye—for Respondent.

Order of Reference

Batchelor, J.—(4th August 1916). — The plaintiff in the suit being entitled to certain property of which the defendant was in possession, sued to recover possession from him, and was met by a contract made by the plaintiff with the defendant to sell the property to the defendant. No conveyance had been executed so as to transfer the property, but the agreement to sell was at the date of suit capable of specific performance. The question is whether this defence is a valid defence to the suit. That question appears to me to be precisely the question concerning which it was said by the Chief Justice and Heaton, J., in *Gangaram Ganpati v.*

Laxman Ganoba (1) that when a suitable occasion arises, it would be necessary to refer it to a Full Bench. For there appears to be divergence of opinion on this point which is of some consequence and of fairly frequent occurrence. In the Full Bench case of *Kurri Veerareddi v. Kurri Bapireddi* (2), which was followed by me, sitting alone in *Timangowda Venkangowda v. Benepgowda Chhenapgowda* (3), it was held that the provisions of S. 54, T. P. Act, are imperative, and that a mere contract of sale does not in the absence of a registered conveyance create any interest in the property agreed to be sold, and cannot be pleaded in defence to an action for ejectment by a plaintiff with a legal title to recover.

But this decision was questioned by the Chief Justice and Heaton, J., in *Gangaram Ganpati v. Laxman Ganoba* (1), where the defendant, having agreed to purchase certain land, paid a portion of the purchase money and went into possession. Thereafter the owner sold the same land to the plaintiff, who had notice of the defendant's prior contract, but who obtained from the owner a registered deed of sale. The plaintiff relying on his registered conveyance sued to recover, but the Court decided against him, holding that the only profit which he could obtain from his conveyance was to stand in the shoes of the vendor, and to receive the balance of the purchase money, on payment of which he would be obliged to convey to the defendant. It is true that in our present case we are dealing only with the two persons, the vendor and the vendee, and that we are not concerned, as the Court was concerned in *Gangaram Ganpati v. Laxman Ganoba* (1), with any third person. But the principle is not, I think, affected by this circumstance, and I am of opinion that it is desirable that a Full Bench of this Court should consider and decide between the views which were accepted by the Madras Court in *Kurri Veerareddi v. Kurri Bapireddi* (2) and those which prevailed in *Gangaram Ganpati v. Laxman Ganoba* (1).

The question which we refer to a Full Bench is: Whether when the plaintiff, being the owner of certain property,

seeks to recover possession of that property, it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant? It is to be taken for the purposes of the case that possession has been taken by the defendant under the agreement for sale and that he is willing to perform his part of it with the plaintiff.

Shah, J.—I agree.

Opinion.

Scott, C. J.—The question for our determination is whether when the plaintiff being the owner of certain immovable property seeks to recover possession of that property, it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant. It is to be taken for the purposes of the case that possession has been taken by the defendant under the agreement for sale and that he is willing to perform his part of it with the plaintiff.

We must start with the propositions enunciated in S. 54, T. P. Act, that sale is a transfer of ownership in exchange for a price paid or promised or part paid or part promised, that such transfer in the case of immovable property of the value of upwards of Rs. 100 can only be made by a registered instrument and that a contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties; it does not, of itself, create any interest in or charge on such property. S. 54 does not however exhaust the relations which flow from a contract for sale of immovable property according to Indian Statute law. This section cannot be read by itself, and one finds in the same Act important provisions in Ss. 40 and 55, the latter of which sections imposes many obligations on the vendor and gives corresponding rights to the purchaser with reference to the property contracted to be sold.

In the last of the sub-sections it is clearly recognized that relief by way of specific performance may in certain events be open to the purchaser. Then

1. (1916) 40 Bom 498=37 I C 360.

2. (1906) 29 Mad 336.

3. (1915) 39 Bom 472=28 I C 946.

turning to the Specific Relief Act, S. 27 (b) provides that specific performance may be enforced against either a party to a contract or any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract; and by S. 12 of the same Act it is laid down that unless and until the contrary is proved, the Court shall presume that a breach of the contract to transfer immovable property cannot be adequately relieved by compensation in money. S. 91, Trusts Act, in the chapter describing certain obligations in the nature of trusts, provides that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance can be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract, and S. 95 provides that a person holding property in accordance with that section must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it. According to the Specific Relief Act, S. 3, "obligation" includes every duty enforceable by law, and 'trust' includes every species of constructive fiduciary ownership, and 'trustee' includes every person holding constructively a fiduciary character. Illus. (g) to that section enunciates in the following manner the same rule as S. 91, Trusts Act:

"A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought."

In S. 40, T. P. Act it is laid down that where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein, such obligation can be enforced against a transferee with notice thereof. The illustration is substantially the same as Illus. (g) to S. 3, Specific Relief Act, above quoted.

It could not be contended that obligations arising out of contract attaching to a transferee with notice as annexed

to the ownership of the property transferred did not attach also to his transferor. The obligation therefore of which a person who has contracted to buy immovable property has the benefit, and which he may enforce against the vendor or his transferee with notice, is, as appears from the provisions above referred to, fiduciary, and can be enforced as though the person bound was a trustee. Where then, a vendor who has contracted to sell immovable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out. The same conclusion was arrived at, without reference to the fiduciary aspect of the vendor's position, by a Full Bench of the Allahabad High Court in *Begam v. Muhammad Yakub* (4). The passage from Story's Equity Jurisprudence cited by Banerji, J., in that case is very apposite upon the question which we have to determine. It is as follows:

"A more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now for the purpose of defending himself against a charge as a trespasser and against an action to account for the profits in such a case, evidence of a parol agreement would seem to be admissible for his protection, and if admissible for such a purpose, there seems no reason why it should not be admissible throughout."

Banerji, J., observes:

"The Courts in this country being Courts both of law and equity are as much bound as the Courts of Equity in England, to give effect to the principles enunciated in the passage quoted above. Upon a legitimate application of these principles not only is the purchaser who has obtained possession entitled to enforce

specific performance of the contract for sale, but if an attempt be made by the seller to evict him by an action in ejectment he would have a valid answer to the action on the ground of fraud. The same ground would be available to him to entitle him to recover possession in the event of his being ousted by the seller. To hold otherwise would be to enable a seller to perpetrate a fraud on the purchaser with impunity."

A Full Bench of the Madras High Court have taken a different view. They do not appear however to have considered the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. We are of opinion that a suit for specific performance is not the purchaser's only remedy, and that he may, in the circumstances stated in the question, if there are no other facts operating to his prejudice, successfully plead his contract of sale and the possession acquired under it. Whether in a suit where the purchaser is a defendant it would be open to a *mofussil* Court to decree specific performance against the plaintiff-vendor we are not called upon to decide. It is hardly likely, however that the plaintiff, faced with the prospect of the dismissal of the suit for possession, would refuse the offer of a decree allowing specific performance to the defendant on payment of the balance of his purchase money.

G.P./R.K.

Order accordingly.

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SCOTT, C. J. AND HEATON, J.

Ruttonsey Rowji and others — Appellants.

v.

Bombay United Spinning and Manufacturing Co., Ltd. — Respondents.

Original Civil Appeal No. 57 of 1915, Decided on 23rd March 1916, from judgment of Macleod, J.

(a) **Contract Act (1872), Ss. 1 and 118 — Variation in contract for sale of goods — Goods not according to description — Mercantile custom varying contract cannot be pleaded.**

In a suit to recover goods contracted to be sold, a mercantile custom contradicting the written contract, which will have the effect of entitling the vendor to require the purchaser to accept that which was not in accordance with the description stipulated for, cannot be pleaded: *North Western Rubber Company, and Huttenbach and Co., In re*, (1908) 2 K. B. 907, *Foll.*; *Walkers, Winsor & Hamm and Shaw Son and Co., In re*, (1904) 2 K. B. 152, *not Foll.*

[P 7 C 1]

(b) **Evidence Act (1872), S. 92 (5) — Custom—Evidence of — If not repugnant to, is admissible.**

Evidence as to custom is however admissible provided it is not repugnant to the written contract or inconsistent with its expressed terms.

[P 6 C 1]

Per *Heaton, J.* — Variation from the written contract is inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance.

[P 9 C 1]

(c) **Civil P. C. (1908), Sch. 2 — Arbitrators can rely on custom and if within their scope can award that buyer shall take goods not per sample at reduced price.**

It is permissible for arbitrators, who are expert in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade, and, if it is within the scope of their reference, to award that the buyer should take the goods found not to be according to sample with a reduction of price: *Produce Brokers Company Limited v. Olympia Oil and Cake Company*, (1916) 85 L. J. K. B. 160, *Ref.*

[P 7 C 1, 2]

(d) **Delivery—Physical and constructive — Holding of goods for buyer and seller in possession has effect of physical delivery.**

Where, under the terms of a contract for sale of goods, the buyer is to clear the goods on receipt of a delivery order by the seller, the vendor ceases to be liable after the transmission of the said delivery order and is entitled to interest and godown rent from that date. When the seller in possession holds the goods on account of the buyer, this has the same effect as physical delivery.

[P 8 C 2]

Setalvad and Desai — for Appellants.

Kanga and Strangman — for Respondents.

Scott, C. J. — This is an appeal from the judgment of Macleod, J., in a suit filed by the plaintiffs, in which they claimed delivery of 113 bales of piece goods and tendered Rs. 7,236 as the price thereof. The defendants counter-claimed a sum of Rs. 20,000 which, they contended, was due to them by the plaintiffs in respect of goods not taken delivery of. Judgment was given for the defendants upon their counter-claim. The defendants entered into various contracts, seven in number, in September and October 1913, for the sale and delivery of piece goods of certain specified descriptions. The contracts will be referred to under the letters A to G. Contract A was for 251 bales of which the plaintiffs took delivery of some, while the contract was cancelled as regards others and 84 bales remained the subject of dispute. Contracts B, C and D covered 658 bales of which 159 were taken delivery of by the plaintiffs who refused to take delivery of the rest, on the ground that the defendants had broken a condition not to give deli-

very of similar goods to other dealers during the period fixed for delivery under the said contracts. Contracts E, F and G covered 305 bales of which 150 were taken delivery of by the plaintiffs, while as to 42 the contract was cancelled and the plaintiffs demanded the balance of 113 on payment of the contract price Rs. 7,236.

The result therefore was that the plaintiffs claimed to eliminate from consideration the 84 bales under contract A and 499 bales under contracts B, C and D. The defendants' counter-claim is for payment of the bales which the plaintiffs claim to eliminate from consideration. Dealing first with the disputed bales under contract A, by a contract, dated 1st October 1913, the plaintiff stipulated that as regards the goods to be delivered the quality and width was to be given according to the 'Textiles' goods Nos. 299½, 999, 9,999 and 99,999 and reinforced the stipulation in his signature by repeating that 251 bales according to the 'Textiles' goods were to be taken. The price of the goods was fixed at Rupees 5-10-0 a piece, each bale containing 60 pieces. The agreement as to price and quantity was confirmed by the defendants' secretary in a document of the same date. The contract signed by the plaintiffs was in a printed form containing nine numbered clauses, which appear in all the contracts, the subject of this suit. For the purpose of the dispute regarding the 84 bales under contract A, it is sufficient to set out Cls. 8 and 9 :

"8. If we have any objection as to finish, quality, width, number, stamp and heading, we agree to refer the same to the arbitration of two members of the Bombay Mill Owners' Association. Out of them one member shall be of our selection and one member shall be of your selection. Should the arbitrators be not unanimous then they are to appoint an umpire and both the parties are to agree to the umpire's award.

"9. As to the objection mentioned in the said Cl. 8, we are bound to make the same known in writing within eight days after the goods are tendered and should we fail to do so, then we agree that our objection shall not at all prevail and we are bound to take delivery of the said goods."

After delivery of some of the goods had been taken under this contract, disputes arose, as the plaintiffs contended that the goods were not according to the contract. Upon this dispute a reference to arbitration took place under Cl. 8 of the contract. The defendants appointed Mr. Langley and the plaintiffs appointed

Mr. Lalji Narainji as their respective arbitrators. The reference was made on 8th July 1914 in a letter addressed to the arbitrators by the plaintiffs' solicitors (Ex. M), after a copy of it had been submitted to the defendants' attorneys on 20th June. The reference is in these terms :

"Clause 8 of the contract provided for reference to arbitration of two members of the Bombay Mill Owners' Association if a difference arose between the parties. A difference has arisen between the parties under the above clause, as to whether the goods tendered are in accordance with the contract, and you gentlemen have been appointed arbitrators to decide the question. We understand you intend to make an appointment as to the time when you would go to survey."

The arbitrators were then requested to give timely intimation of the time of survey, as it was necessary for the parties to be present. On 31st July the arbitrators published their award, which states that they met to settle the dispute between the defendants and the plaintiffs regarding a contract which stipulated that the goods were to be of the same quality as the goods of the Textile Mills Nos. 299½, 999, 9,999 and 99,999. That pieces of the Textile Mill manufacture were produced and inspected by both parties as a basis for arbitration and that in comparing them with pieces from the bales delivered by the defendants there was found to be a difference in finish, quality, width, and, in some cases, of design and colour. The arbitrators then proceeded to state that their award was that the buyer was entitled to an allowance of four annas per piece on 84 bales only and must take delivery as per terms of contract with this allowance. And they stated that in their opinion these 84 bales should be free of interest to the buyer up to 31st July and should be debited on that date. Four days later the defendants' solicitors wrote to the arbitrators stating as follows :

"With reference to your survey report of 31st July last regarding the dispute between our client and Mr. Ruttonsey Rowji, we are instructed to state that you were only requested to report on the quality, finish, etc., of the 84 bales in question. You had no right to state in the above report that, in your opinion, the said 84 bales should be free of interest to the buyer until 31st July and should be debited on that date. Our clients therefore do not bind themselves to accept the above statement."

The defendants were not the only objectors to the award ; for, on 10th August, the plaintiffs' solicitors ad-

addressed those of the defendants referring to the arbitration and the award as follows :

"We must state at once that our clients has been advised that the direction in the award that our client should take the goods at the allowance specified is outside the scope of the reference. Our client is not bound to take the goods on an allowance and declines to do so."

With regard to these two letters, it is to be noted that the defendants merely stated that they did not bind themselves to accept the statement about interest and that the plaintiffs' refusal to be bound to take the goods on an allowance was not communicated until five days or more after the declaration of the European war. The question is whether the plaintiffs are bound to take the 84 bales at an allowance reducing the contract price. There is no such provision in the contract and, so far as there is any indication as to the result of a successful objection regarding the quality, etc., of the goods tendered, Cl. 9 impliedly indicates that the plaintiffs would not be bound to take delivery. The defendants' case however does not rest upon the terms of the contract. A day before the hearing commenced in the lower Court, the defendants' solicitors gave notice that at the hearing of the suit they would, if necessary, rely on a custom of trade in Bombay, applicable to the sale of goods to be manufactured of the quality and description referred to in the contracts in this suit, that a buyer has not a right to reject merely for difference in width, etc., provided that the difference is not unreasonable and is a matter that can reasonably be met by an allowance in the price. At the hearing an issue was raised regarding the alleged custom. It was objected to by the plaintiffs, but was allowed by the learned Judge subject to amendment of the written statement by the defendants. Thereafter at the trial, evidence was given of the alleged custom. It is not contended that such evidence was inadmissible provided the custom proved did not annex an incident to the contract repugnant to, or inconsistent with, the expressed terms: see S. 92, Evidence Act, proviso 5.

The defendants rely upon the custom alleged to avoid the ordinary consequences of a breach of contract for sale of goods according to sample, resulting from

the provisions of S. 118, Contract Act. They contend that such a custom modifying the consequences resulting from the application of S. 118, would not, within the meaning of S. 1, Contract Act, be "inconsistent with the provisions of the Act." Nor do the plaintiffs, as I understood the argument, contend that the custom would be inconsistent with the provisions of the Act. They insist, however that it would be inconsistent with the provisions of the contract. The learned Judge held that the evidence conclusively proved that in the country piecegoods trade, where a contract is made for unascertained goods either according to a particular sample provided by the buyer or according to a stock number of the manufacturer and the contract contains an arbitration clause under which all disputes are to be referred to arbitration, the arbitrators proceed on the footing that under the reference they are to survey the goods and either award that the goods may be rejected or must be taken with or without an allowance. This is not a custom regulating the rights of parties under the contract so as to be inconsistent with its express terms, but rather a customary incident annexed to the powers of arbitrators on their appointment under contracts of this description.

It appears to me that such a custom, as is alleged in the amended written statement, would be inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price. The same question has in England, given rise to differences of judicial opinion. In *Walkers, Winsor & Hamm and Shaw Son & Co. In re* (1) it was argued that the introduction of a price is merely to set up a standard of value, that is the value of goods corresponding to the sample, and there may be a consistent custom providing for the variation in price upon a variation in quality, and Channel, J., held that if the custom went to the length of saying that there should be no remedy for any variation in quality, it would be unreasonable but being simply a custom that the buyer takes the goods with a variation in price and with the limitation imposed by the words "unless the same is excessive or unreasonable," it

would not be inconsistent with the written contract. On the other hand, Moulton, L. J., in *North Western Rubber Company and Huttenbach & Co., In re* (2) expressed the opinion that such a custom contradicted the written contract relieving the vendor from his obligation and entitling him to require the purchaser to accept that which was not in accordance with the description. It does not appear to me that the question whether such a custom, as is alleged, would be inconsistent with the written contract is affected in any way by the judgments of the House of Lords in the recent case of *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co.* (3). I agree with the learned trial Judge in preferring the reasoning of Moulton, L. J. to that of Channel, J.

This conclusion, however by no means disposes of the question regarding the 84 bales. The arbitrator Langley has deposed that he and his co-arbitrator made their award upon the footing that a custom did exist that the buyer of local piece-goods must send the goods to be surveyed and is only entitled to reject if the surveyor decides the goods are so much off the sample that they are not saleable as of the quality ordered. If there is a difference which does not amount to this, he is bound to take it on an allowance. Langley and his co-arbitrator understood they were to proceed with the reference in the usual way and did so, awarding an allowance of 4-annas per piece. Lalji Naranji's evidence in examination-in-chief is to the same effect. The cross-examination was not directed to the practice before arbitrators but rather to the custom set up in the written statement. It is permissible for arbitrators who are experts in the trade in which the question referred to them has arisen, to act upon their own knowledge of the usages of that trade: see the judgment of Lord Loreburn in the case of *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co.* (3).

It is however contended for the plaintiffs that the practice of arbitrators in fixing allowances, even if sanctioned by custom, is irrelevant in the present case owing to the restricted terms of the reference of 8th July. It is contended that the arbitrators had no authority to

decide any question but that stated in the reference, namely, whether the goods tendered were in accordance with the contract. This contention receives support not only from the defendants' solicitors' letter of 3rd August and the post bellum repudiation by the plaintiffs' solicitors, but also from the decision of the Court of appeal in England *In re Arbitration between Green & Co. and Balfour, Williamson & Co.* (4), in which it was held that under a very similar reference the arbitrators had no jurisdiction to award that the buyer should take goods found to be not up to the sample with a reduction of price. It is apparent however from the judgments delivered in that case that evidence would be admissible to show that the arbitrators had in fact been asked to decide something more. In the arbitration under contract A the facts are that at the survey the plaintiffs asked Lalji Naranji, who was his nominee, to award an allowance in the hearing of Lukhmidas Vussonji, the defendants' salesman, who represented them at the survey. No objection to such a course was taken by Lukhmidas nor have the defendants ever objected to the allowance made by the arbitrators. In this respect therefore they must be taken to have ratified the conduct of their representative in not objecting to the request of Raoji that an allowance should be made. Under these circumstances I see no reason to differ from the conclusion arrived at by the learned Judge that it cannot be said that the question of the allowance was not properly referred to the arbitrators.

In this view of the case the question whether the custom alleged would be inconsistent with the written contract standing alone, is not the crucial question. The plaintiffs are bound by the award made in pursuance of their request and not objected to by their opponents. I may observe that there appears to me to be no foundation for the defendants' contention that the scope of the reference was not the subject of consideration in the trial Court. It is, I think, perfectly clear that the learned Judge was dealing with this point in the passage in which he discusses the conduct of the plaintiffs at the time of the survey. It is equally clear that the same point has been urged on behalf of

2. (1908) 2 K B 907=78 L J K B 51.

3. (1916) 85 L J K B 160.

4. (1890) 63 L T 325.

the plaintiffs in Cl. 10 of the memorandum of appeal. For the reasons stated above I am of opinion that the decision of the learned Judge regarding the 84 bales under contract A should be affirmed. The remaining point is whether the defendants have broken the contracts B, C and D of September 1913, in which they agreed as follows:

"We are to give delivery of the goods which may have been sold before this contract, but we are not to give delivery of the same during your period."

Prior to these contracts the defendants had entered into contracts on similar printed forms with two other dealers for delivery of similar goods over certain periods, which were running in September 1913 but would expire before the periods for delivery of the plaintiffs' goods under contracts B, C and D would commence. The common features of all the contracts material for the present point are Cls. 1, 3, 4, 5, 6 and 7 in Ex. O-1 :

"1. We have purchased the said goods under manufacture and we bind ourselves to take delivery of all the goods appertaining to this contract or a part thereof as you may give delivery. 3. Should we fail to clear the goods within twenty-four hours of their being ready for delivery, then the goods shall remain at our risk and we are responsible for all kinds of damages. 4. Your giving notice of the goods being ready is tantamount to your tendering the same. On the notice being posted to our address the same would be considered to have reached us. 5. When you tender the goods we are bound to pay for and clear the same. 6. If we do not clear the goods, then we are to pay interest at the rate of 9 per cent from the date on which the same should have been cleared. So also we bind ourselves to pay godown rent, insurance (charges) and whatever other expenses may be incurred. 7. Should we fail to clear the goods in time, then you may sell the same at any time you like either by public auction or by private sale in one lot or in pieces at our risk and cost; and as to whatever loss you may suffer thereby we are to pay the same without (raising) any objection and as to whatever profit may be made we shall have no manner of right thereon."

In practice the defendants about once

each month would send the buyer a delivery order in respect of such of the contract goods as were ready for delivery in the company's godown and the buyer would sign an acknowledgment of delivery of so many bales and the goods would be debited to him by the defendants. If his obligation to clear the goods within twenty-four hours under Cl. 3 was not discharged, interest would begin to run as well as godown rent for the storage in the defendants' godown and insurance, other charges under Cl. 6 to be followed on failure to clear and pay for the goods within a reasonable time by sale by the defendants at the buyer's risk and cost. Under Cl. 9 of the contract objections to the goods would not prevail if not made within eight days and the buyer would be bound to take delivery notwithstanding his objections. The defendants contend that the debiting of goods to the buyer and sending him a delivery order for signature marks the period of delivery, for within twenty-four hours the defendants would hold uncleared goods as warehousemen and bailees for the buyers. In my opinion this contention is correct. "Delivery" within the meaning of the added clause relates to some act to be done by the sellers, but their obligations ceased with the debiting of the goods and their transference from the defendants' mills to their godown. Thereupon constructive delivery took place :

"it is a change of possession without any change of actual custody... A seller in possession may assent to hold the thing sold on account of the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer or his servant and is an actual receipt by the buyer" see Pollock and Wright on Possession, p. 72.

Holmes, in the Common Law, p. 233, remarks that :

"Where goods remain in the custody of a vendor, appropriation to the contract and acceptance have been confounded with delivery. Our law has adopted the Roman doctrine, that there may be a delivery, that is, a change of possession, by a change in the character in which the vendor holds, but has not always imitated the caution of the civilians with regard to what amounts to such a change."

Here, in my opinion, the provisions of the contracts preclude the possibility of doubt as to the point of time when the change occurs. It is not necessary to repeat the indications noted by the learned trial Judge of the understanding of the parties in the matter, but we may

add that the award itself affords an instance of the practical effect of Cl. 9 of the contract. The arbitrators, experts in the practice of the trade, held that with regard to the bales debited on 30th May and objected to on 5th June, interest should only run from 31st July, the date of the award upon the objections. This would be the period of change of possession, if not of custody. The decree of the lower Court must be affirmed and the appeal dismissed with costs on the appellants.

Heaton, J.—I agree that the appellants' contention as to contract A fails and that Macleod, J.'s judgment in this particular should be affirmed. But I am far from sure that it cannot be affirmed on the ground that there is not any contradiction or repugnance between the written contract and the contract as modified by the custom. Whenever a custom prevails, it necessarily leads to the establishing of a contract different in some particulars from the written contract, otherwise custom would be useless and would never be relied on. Variation from the written contract is therefore inevitable where a custom has to be relied on. But variation need not be contradiction or repugnance; in some cases it is, in some it is not. In this particular case I think it is not. I need not develop the point, as the judgment of Macleod, J., is supported on other grounds. As to the rest of the decision I agree.

G.P./R.K. *Appeal dismissed.*

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BATCHELOR AND SHAH, JJ.

Bal Gangadhar Tilak—Applicant.

v.

Emperor—Opposite Party.

Criminal Appln. for Revn. No. 252 of 1916, Decided on 9th November 1916, from order of Dist. Magistrate, Poona.

(a) Penal Code (1860), S. 124-A—"Disaffection," meaning of—Not mere absence of affection.

The word "disaffection" as used in S. 124-A of the Penal Code is not the equivalent only of mere absence of affection. [P 43 C 1; P 47 C 1]

(b) Penal Code (1860), S. 124-B—Speech must be read as a whole—Whole general effect must be seen.

In order to determine whether a speech offends under S. 124-A, Penal Code, it must be read as a whole. A fair construction must be put upon it, straining nothing either for the prosecution or for the accused, in paying more attention to the

whole general effect than to any isolated words or passages. [P 43 C 2; P 44 C 1; P 48 C 1]

(c) Criminal P. C. (1898), S. 108—Advocating Home Rule does not per se amount to dissemination of seditious matter.

A speech advocating the establishment of Home Rule in India and the attainment of it by constitutional means does not per se amount to disseminating seditious matter within the meaning of S. 188, Criminal P. C. [P 44 C 1; P 48 C 1]

(d) Penal Code (1860), S. 124-A—(Per *Batchelor, J.*) Profession of loyalty however sincere is no defence.

Per *Batchelor, J.*—To a charge of exciting disaffection towards the Government established by law in British India a profession, however sincere, of loyalty to His Majesty and the British Parliament is no answer whatever. [P 43 C 2]

(e) Penal Code (1860), S. 124-A—Advocating a policy as to obtain increasing share of political authority and of making administration subject to control of people is no offence.

The advocacy of principles the object of which is to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people or peoples of India is not per se an infringement of the law. [P 44 C 1]

(f) Penal Code (1860), S. 124-A—Advocating Home Rule in India some grounds and fair criticism is no offence—What is fair criticism stated.

To advocate the establishment of Home Rule for India on the contentions that Indian administrators govern Native States without complaint; that in British India British officials are paid too highly, and Indians, though they are free to discuss, have no effective control over finance or policy; that the present officials being in fact alien by race, though able and industrious men, do not readily understand the needs of the people, is fair political criticism and is not obnoxious to S. 124-A, Penal Code. [P 45 C 2]

(g) Penal Code (1860), S. 124-A—Long oral speech how to be construed stated—Particular passages which may have made no impression on public should not be selected to bring the speech within mischief of S. 124-A.

In construing a long speech delivered orally particular passages which occupy no specially prominent place in the address and which would not specially impress themselves on the minds of the audience so as to override the general effect, should not be selected in order to bring the speaker within the mischief of S. 124-A, Penal Code. [P 46 C 1, 2]

(h) Penal Code (1860), S. 124-A—Government of India—Civil service principal agency—Criticism of Civil Service en bloc infusing hatred about it amount to infusing hatred against Government.

All governments established by law act through human agency and the Civil Service in India is the principal agency of the Government for the administration of the country in time of peace. Therefore criticisms of the Civil Service en bloc in words, the natural effect of which is to infuse hatred of the Civil Service, amount to infusing hatred or contempt of the established Government whose accredited agent the Civil Service is. [P 43 C 2]

(i) Penal Code (1860), S. 124-A — (Per *Shah, J.*) Long speech how to be construed stated—Question is of determining its probable effect taken as a whole, stray, sentences or words are not to be picked up—Object of speech when fair, undue importance to objectionable passages should not be given.

Per *Shah, J.*—In construing a speech for the purposes of S. 124-A, Penal Code the question is one of determining its reasonable, natural and probable effect taken as a whole on the minds of those to whom it is addressed. It must be read as a whole in a fair, free and liberal spirit. In dealing with it one should not pause upon an objectionable sentence here or a strong word there. It should be dealt with in a spirit of freedom and not viewed with an eye of narrow criticism: *Reg v. Burns*, (1886) 16 Cox C C 355. Ref. [P 47 C 2; P 48 C 1]

In determining the general effect of a speech the avowed object of which is to create a public opinion in favour of Home Rule for India and to induce the hearers to join the Home Rule League and which does not advocate for the achievement of its object any means other than strictly constitutional ones, care should be taken not to attach undue importance to objectionable passages. [P 48 C 1]

(j) Penal Code (1860), S. 124-A—Government established by law in British India denotes persons administering executive Government.

The "Government established by law in British India" means the various Governments constituted by the Statutes relating to the Government of India now consolidated into the Government of India Act, 1915, and denotes the persons or persons authorized by law to administer Executive Government in any part of British India. [P 47 C 1]

(k) Penal Code (1860), S. 124-A — Disaffection how created—Unfair criticism of one of Government's services is one way—Whether condemnation of particular service creates disaffection against Government is question of fact and depends upon circumstances of each case.

The feelings, which it is the object of S. 124-A, Penal Code, to prohibit, may be excited towards the Government in a variety of ways, and it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case. It would be a question of fact to be determined in each case with reference to its circumstances. [P 47 C 1, 2]

Jinnah and *S. R. Bakhale*—for Applicant.

Jardine, Strangman, Binning, Patwardhan and *S. S. Patkar*—for the Crown.

Facts.—The applicant was directed by the District Magistrate of Poona, to be bound over for one year under S. 108, Criminal P. C., for delivering three public lectures in Marathi at Belgaum and

Ahmednagar, of which the following is the official translation:

Lecture of 1st May 1916.

When I was requested to give a lecture here (Belgaum) to-day, I did not know on what to lecture. I do not stand before you today after having made any preparation for any particular subject. I had come for the conference. Thinking that it would not be improper if I were to say a few words to you about those subjects which were discussed during the past two or four days and about the object with which a Home Rule League was established here before the Congress, I have selected that subject for today's lecture. What is swarajya? Many have a misconception about this. Some do not understand this thing. Some, understanding it, misrepresent it. Some do not want it. Thus there are many kinds of them. Therefore I am not prepared today to make any particular discussion of any sort beyond saying a few general words on the following among other points: What is swarajya? Why do we ask for it? Are we fit for it or not? In what manner must we make this demand for swarajya of those of whom we have to make it? In what direction and on what lines are we to carry on the work which we have to carry on? It is not the case that these general words which I am going to say are the outcome of my effort and exertion alone. The idea of swarajya is an old one. Of course when swarajya is spoken of (it shows that) there is some kind of rule opposed to swa (i. e., our), and (that) this idea originates at that time. This is plain. When such a condition arrives it begins to be thought that there should be swarajya, and men make exertions for that purpose. You are at present in that sort of condition. Those who are ruling over you do not belong to your religion, race or even country. The question whether this rule of the English Government is good or bad is different. The question about 'one's own' and 'alien' is different. Do not make a confusion of the two at the outset. When the question 'alien or 'one's own' comes, we must say 'alien.' When the question 'good or bad' comes, or say 'good' or say 'bad.' If (you) say 'bad' then what improvement must be made in it?—this question is different. If (you) say 'good,' it must be seen what good things are under it which were not

under the former rule. These are different points of view. Hence, the reason why the demand for swarajya first arose is that. . . . Formerly there were many kingdoms in our India—in some places there was Mahomedan (rule), in some places there was Rajput (rule), in some places there was Hindu (rule) and in some places there was Maratha (rule)—were these swarajyas good or bad? I again remind you that this is a different question. We shall consider it afterwards. All those being broken up, the universal sovereignty of the English Government has been established in India. Today we have not to consider the history of their downfall. We have not to consider how they fell. Nor am I going to speak about it. But the present system of administration is such that some able men who have been educated in England and have received college education come to India and the State administration of India is carried on through them. 'Emperor' is (merely) a name. When you give a visible form to the sentiment which arises in your mind at the mention of (the word) 'raja' (i. e., king), there is the present Emperor. This sentiment is invisible. When a visible form is given to this invisible (something), there is the King, the Emperor. But the Emperor does not carry on the administration.

The question of swarajya is not about the Emperor nor about this invisible sentiment. This must be remembered at the outset. Let there be any country, it must have a king, it must have some man to carry on its management and there must be exercised some sort of rule in it. The case of anarchical nations is different. These nations never rise. As in a house there must be some one to look to its management, when there is no man belonging to the house an outsider is brought in as a trustee—just so is the case also of a kingdom. In every country there is a certain body for carrying on its administration and there is some (sort of) arrangement. An analysis must be made of both these things, viz., of this arrangement and this body and, as stated yesterday by the President (the President of the Provincial Conference), of the sentiment of 'king.' There must be a king, there must be State administration. Both these propositions are true from the historical point of

view. Of a country where there is no order, where there is no king, that is, where there is no supervising body, the Mahabharat says: 'A wise man should not live even for a moment at that place. There is no knowing when at that place our lives may be destroyed, when our wealth may be stolen, when our house may be dacoited, nay, set on fire.' There must be a government. I will not say at length what there was in the kritayug in ancient times. The people of that time did not require a king. Every one used to carry on dealings only after seeing in what mutual good lay. Our Purans say that there was once a condition when there was no king. But if we consider whether such a state existed in historical times it will appear that such a condition did not exist in historical times.

There must be some controller or other. That control cannot be exercised every time by all people assembling together at one place. Hence, sovereign authority is always divided into two parts: one the advisory body, and the other the executive body. The question about swarajya which has now arisen in India is not about the said invisible sentiment. This question is not about those who are to rule over us, (and) according to whose leadership, by whose order and under whose guidance that rule is to be exercised. It is an undisputed fact that we should secure our own good under the rule of the English people themselves, under the supervision of the English nation, with the help of the English nation, through their sympathy, through their anxious care and through those high sentiments which they possess. And I have to say nothing about this (cheers). This is the first thing. Do not create confusion in your minds by confounding both the things. These two things are quite distinct. What we have to do we must do with the help of some one or other, since today we are in such a helpless condition. It is an undoubted fact that we must secure our good under their protection. Had it not been so, your independence would never have gone. Hence if we take for granted that we have to bring about the dawn of our good fortune with the help of the English Government and the British Empire, then the one more strange thing which some people see (lit.

think) in this will altogether disappear. To speak in other words, there is no sedition in this. If then without the help of the English Government, if the words 'invisible English Government' be used for the words 'English Government' there will be no mistake, if with the help of this invisible English Government, with the aid of this invisible English Government, you are to bring about the dawn of your good fortune, then, what is it that you ask? This second question arises.

The answer to it, again, lies in the very distinction of which I spoke to you. Though a Government may be invisible, still when it begins to become visible, the management of that kingdom is carried on by its hands and by its actions. This state of being visible is different from invisible Government. If you ask how, (I say) in the same manner as the great Brahma is different from Maya. I have taken the words visible and invisible from Vedanta (philosophy). The great Brahma which is without attributes and form is different, and the visible form which it assumes when it begins to come under the temptation of Maya is different. Hence these dealings which are due to Maya are sure to change. What is the characteristic of Maya? (It is) to change every moment. One Government will remain (viz.) invisible Government, and the visible Government changes every moment. The word swarajya which has now arisen relates to visible Government. Maintaining the invisible Government as one, what change, is effected, in the momentarily changing visible Government, would be beneficial to our nation? This is the question of swarajya. And this being called the question of swarajya, there arises the question, 'In whose hands should be that sort of administration which is now carried on in our India?' We do not wish to change the invisible Government, English Government.

We say that (the administration) should not be in the hands of a visible entity by whose hands this invisible Government is getting works done, but should pass into some other's hands. The swarajya agitation which is now carried on is carried on in the belief that this administration, if carried on by some other hands (or) with the help of some one else, (or) by some other visible

form, would be (more) beneficial to the people than when carried on by those by whose hands it is carried on. If another instance is to be given, it can be said that there is an Emperor in England. An English Act contains the rule that the King commits no wrong. The King never commits a wrong (lit. offence). For, his authority is limited in such a manner that (only) when a certain minister goes and tells something to him then he knows it. The Prime Minister does acts on his own responsibility. There may be a good many (people) here who have studied English history. It is not the case that this is not so. This is the chief principle in it. This principle having arisen in English history, (the number of) seditious cases began to fall. While here, these (people) begin to institute cases of sedition. Those who carry on the administration are different and the King is different. The King is one and the same. But the ministry changes every five years. At that time no one says that it would be sedition if anyone were to start any discussion advocating change of ministry. These are the things happening every day before the eyes of the English people. The King's circle (of ministers) went (out of office) after five years, went (out of office) after two years; they may quarrel among themselves as much as they like. What is that to the King? He is the great Brahma without attributes. He is not affected by this.

The swarajya agitation now existing in India is, then, about change in such a ministry. Who rules in India? Does the Emperor come and do it? He is to be taken in procession like a god on a great occasion, we are to manifest our loyalty towards him, this alone is their duty. Through whom, then is the administration carried on? It is carried on through those who are now servants (viz.) the State Secretary, Viceroy, Governor, below him the Collector, the Patil and lastly the police sepoy. If it be said that one police sepoy should be transferred and another police sepoy should be given, would that constitute sedition? If it be said that the Collector who has come is not wanted and that another is wanted, would that constitute sedition? If it be said that one Governor is not wanted, another Governor should be brought, would that constitute sedition?

If it be said, 'This State Secretary is not wanted, bring another,' would that constitute sedition? Nobody has called this sedition. The same principle which is applicable to a police sepoy is also applicable to the State Secretary. We are the subjects of the same King whose minister the State Secretary is and whose servant he is. This then being so, if any one were to say, 'The State Secretary is not wanted, this Viceroy is not wanted, Fuller Saheb is not wanted in Bengal,' such resolutions have often been passed in the case of Governors, not in the present, but in the past times, and were to give reasons for that, you would say about him that his head must have been turned, (and that) the reasons he gives are not good or sufficient.

But from the historical point of view it does not follow that when he says so that constitutes sedition (cheers). Our demand belongs to the second class. It is concerned with swarajya. Consider well what I say. If you think that the present administration is carried on well then I have nothing to say. In the Congresses and Conferences that are now held you come and say: 'Our kulkarni vatan has been taken (away), zulum has been exercised upon us in connexion with the Forest Department, liquor (drinking) has spread more in connexion with the Abkari (Department), also we do not receive that sort of education which we ought to get.' What is the root of all this? What is the benefit of merely saying this? Why do you not get education? Why are shops of the Abkari Department opened where we do not want them? In the Forest Department, laws about reserved forests and about forests of this sort or of that sort are made. Why were they made? At present, lists upon lists about this come before the Congress. Why was your jury abolished against your will? Why was no College opened in the Karnatic up to this time? All these questions are of such a kind that there is but one answer to them. At present our thoughts run this way: is there no College?—make petition to the Collector or to the Governor, because they have power in their hands.

If this power had come into your hands, if you had been the officials in their places or if their authority had been responsible to the public opinion,

these things would not have happened. No other answer than this can be given to the above. These (things) happen because there is no authority in your hands. The authority to decide these matters is not given to you for whose good this whole arrangement is to be made. Hence what we may have to ask becomes like (that asked by) a little child. It cries when it is hungry. It cannot say that it is hungry. Then the mother has to find out whether it may be hungry or have a bellyache. Sometimes the remedies used prove to be out of place. Such has become our condition at present. In the first place you do not at all know what you want (and) where lies your difficulty. When you came to know it, you began to speak with your mouth. But you have no power in your hands to cause (things) to be done according to your words. Such being the condition, what has happened now? Whatever you have to do, whatever you want—if you want to dig a well in your house—make a petition to the Collector. If you want to kill a tiger in the forest make a petition to the Collector. Grass is not obtained, bundles (of wood) are not obtained from the forest, permission to cut grass is required—petition the Collector. That is to say, all this has become like (the case of a) helpless man. We do not want this arrangement. We want some better arrangement than this. That is swarajya, that is Home Rule.

In the beginning these questions do not arise. As when a boy is young he knows nothing, when he grows up he begins to know these things, and then begins to think that it would be very good if the household management were made at least to some extent according to his opinion: just so it is with a nation. When (lit. as) it is able to consider this thing, when it acquires the capacity of considering (this thing), then this question is likely to arise. But now the condition here has become such that we had better give up the above thought, let us give up the thought about the invisible Government, let us come within the limits of the visible Government, (we then see that) the people who make this arrangement, who carry on this administration, are appointed in England according to a certain rule and law, and rules are made within the limits of those

laws as to what should be their policy. These rules may be good or bad. They may be good, they may be quite well arranged and methodical. I do not say that they are not. But however good may be the arrangement made by (other) people, still it is not the case that he who wants to have the power to make this arrangement always approves of this.

This is the principle of swarajya. If you got the powers to select your Collector, it cannot be said with certainty that he would do any more work than the present Collector. Perhaps he may not do. He may even do it badly. I admit this. But the difference between these and those is this: this one is selected by us; he is our man; he sees how (lit. in what direction) we may remain pleased; while the other thinks thus: 'what we think to be good must appear so to others. What (is there with respect to which) we should listen to others? I am so much educated, I get so much pay, I possess so much ability, why should I do anything which would be harmful to others?' The only answer is 'because (you) have such conceit.' (Laughter.) There is one way, there is no rule about it. He whose belly is not pinched has no experience about it. This is the only cause of it, there is no other cause. Hence if you minutely consider the various complaints which have arisen in our country (it will appear that) the system which is subsisting now is not wanted by us. Not that we do not want the King, nor that we do not want the English Government, nor that we do not want the Emperor. We want a particular sort of change in the system according to which this administration is carried on, and I for one do not think that if that change were made there would arise any danger to the English rule (lit. kingdom). But there is reason (lit. room) to think that some people whose spectacles are different from ours may see it, because they say so (cheers). Hence the minds of many people are now directed to the question as to what change should be effected in the system according to which the rule of the English Government is exercised in the above manner. We make minor demands, viz., remove the (liquor) shop in a certain village named Ghodegaon; they would say it should not be removed.

Done. (If it is said) reduce the salt tax, they say, we look to the amount of revenue derived from salt duty.

If this tax is reduced, how should it be managed there? But he who has to make the arrangement has to do these things. When I ask for the authority to manage my household affairs, I do not say, give me the income which you obtain, and do not spend (it). We ourselves have to make the expenditure and we too have to collect money, this is the sort of double (lit. united) responsibility which we want. Then we shall see what we have to do. Such is the dispute at present. Other bureaucrats who come say, act according to our wishes. We say, act according to our wishes so that all (our) grievances will be removed. We know that sometimes a boy obstinately asks for a cap of Rs. 25 from his father. Had he been in his father's place it is very doubtful whether he would have paid Rs. 25 for the cap or not. The father refuses, but he (the boy) is grieved at the time. And why is he grieved at it? Because he does not understand (the thing); because the management is not in his hands. Hence the introduction of such an administration is beneficial to India. We want this thing today. When this one thing is got the remaining things come into our possession of themselves. This is the one root of the thousands of things which we are asking for. When we get this key into our hands we can open not only one but 5 or 10 doors at once. Such is the present question. It is in order that the attention of all may be directed to this question that this Home Rule League was established here the other day. Some will be grieved at it; I do not deny it. Every one is grieved. It was said here some time back that when a boy is a minor, the father when dying appoints a panch. The panch when appointed supervises the whole of the estate.

Some benefit is also derived from this (arrangement). This is not denied. Afterwards when this boy begins to become a little grown up, he sees that there is something wrong in this. I must acquire the right of management, then I shall carry on better management than this. He is confident of this. Not that he actually carries on the management in that manner. Per-

haps, if he be a prodigal, he may squander away his father's money. But he thinks as above. In order to avoid any opposition between these two, the law lays down the limitation that (on the boy's) completing 21 years (of his age), the trustee should cease his supervision and give it into the boy's possession. This thing which belongs to practical life applies also to the nation. When the people in the nation become educated and begin to know how they should manage their affairs, it is quite natural for them that they themselves should manage the affairs which are managed for them by others. But the amusing thing in this history or politics is that the above law about 21 years has no existence in politics. Though we may perhaps somehow imagine a law enjoining that when you have educated a nation for a hundred years you should give its administration into its hands, it is not possible to enforce it. The people themselves must get this effected. They have a right (to do so). Hence there must be some such arrangement here. Formerly there was some such arrangement to a little extent.

Such an arrangement does not exist now. And herein lies the root of all these our demands, the grievances which we have, the wants which we feel (and) the inconveniences which we notice in the administration. And the remedy which is proposed after making inquiries about that root in the above manner is called home rule. Its name is swarajya. To put it briefly, the demand that the management of our (affairs) should be in our hands is the demand for swarajya. Many people (lit. even many people) have at present objections to this. I merely gave the definition in order to make (the subject) clear. The people on the other side always misrepresent it. If there be no mistake in the logical reasoning of what I have now said, how will any mistake arise unless some part of it is misrepresented? Hence, those people who want to point out a mistake misrepresent some sentences out of this and find fault with it, saying this is such a thing, this is such a thing. Hence, it is not the duty of a wise man to impute those things to us which we never demand at all, to censure us and in a manner ridicule us before the people.

What more shall I say than this?

(Cheers). Hence, if any one of you has such a misconception let him give it up. At least remember that what I tell is highly consistent. It is in accordance with logical science. It agrees with history. I said that king means invisible king or government. This constitutes no offence whatever. There are deities between. At several times God does not get angry; these deities get angry without reason. Some settlement is to be made with respect to them. Hence if there has arisen any such misconception it should be removed. I have told this for this purpose. Now I tell the nature of it to you. And even before that let us also consider a little the question whether we are fit for (carrying on) such sort of administration or not. Some time ago I gave you the instance of panch and their ward. There generally it happens that as the boy grows up more and more, those who think that the management should not pass into other hands make reports that his head has now begun to turn; another says that he is not mad, but that he appears to be half mad. The reason of this is that the management should remain in his hands for a couple of years more. A third says:

'True, you may give authority into his hands, but do you know that he has got bad habits? These (people) tell five or ten things about him. What is to be gained by doing this much? Then the dispute goes before the Court and then they get him adjudged mad. Some things like these have now begun to happen here. To give authority into people's hands is the best principle of administration. No one disputes this. Because the same thing is going on in the country of those officials who are here. When they go there they have to advocate the same principle. Therefore no one says that this historical principle is bad. Then what is bad? They distinctly say that the Indians are not to-day fit for swarajya (laughter), and some of us are like the rogues in the story of the three rogues occurring in the Panchatantra. That story is as follows: A villager had come taking a sheep on his head.

One rogue said to him 'There is a she-goat on your head.' The second said 'There is a dog on your head.' The third one said quite a third thing. He threw away the sheep. The rogues took it away. Our condition is like that. This

relates to human nature. There are among us people who are just like them. Why are we not fit? Because fitness has not been created in us. We have not done (it), our parents have not done it. We too have not got such powers. But the Government has given you some powers in the Council. Sinha (and) Chaubal are in the Council. In the Executive Councils of other places also there are selected people. When these people were selected for appointment, did any one even say (lit, write) 'We are not fit, do not give us the post.' No one said (cheers). What then is the use of saying (so) after coming to our meeting? I shall consider that these people are speaking the truth if, when the bureaucracy actually confers some great powers on them, they stand up and say: 'We do not want them, we are not fit for them—the Brahmins alone must come and perform shraddha at our house, we cannot perform it.' I think that those men who say such things because such and such a person would not like (any particular thing) and bring forward such excuses for that purpose, in a manner make an exhibition of their weak nature (cheers). Why are we not fit? Have we no nose, no eyes, no ears, no intellect? Can we not write? Have we not read books? Can we not ride a horse? Why are we not fit? As a Jew in one of Shakespeare's dramas asked, I ask you what have we not? You have not done work. If it is not given at all, when are we to do it? (Cheers.) Has it ever happened that we did not do work when it was given? No one did then say, we are unfit, do not appoint us. You appoint them. You get work done by them and afterwards it is also announced in a Government Resolution: 'He has done his duty' and so on. On the contrary, going further, it is to be asked, you bring from England quite a new man of 21 years. What can he do? Has he any experience at all? He comes all at once and straightway becomes Assistant Collector, and becomes the superior of a mamlatdar though the latter be 60 years old. * * * * *

Is 60 years' experience of no value? A man of 21 years comes and begins to teach you. Generally he makes this mamlatdar of 60 years stand before him. He does not give (him) even a chair for sitting, and this poor man stands before

him with joined hands because he has to get Rs. 150, 200 and 400 (cheers).

How then is the Saheb to acquire experience, how is he to become fit, and how is the work (lit. cart) to go on? Has anyone thought about this? Had it been true that the people of India are not fit for swarajya and that they would not be able to keep their kingdom in good order, then Hindus and Mahomedans would never have governed kingdoms in this country in ancient times. Formerly there were our kingdoms in this country. There were administrators. The proof of this is that before the advent of the English Government in this country there was at least some order, there was no disorder everywhere. One man did not kill another. Since there existed such order, how are we to say that the people are not fit (for powers)? At the present time, science has made progress, knowledge has increased, (and) experience has accumulated in one place. Hence we must have more liberty than before, and we must have become fitter. But, on the contrary, (it is said) we are not fit. Whatever might have been the case in former times, this allegation is utterly false. Better say, (it) is not to be given (cheers). What I say is, do not apply the words 'not fit' (to us). At least we shall know that this is not really to be given. We shall get it. But why do we not get it? It is indirectly said that we are not fit.

It is to teach you that we have come here. This is admitted. But how long will you teach us? (Laughter.) For one generation, two generations, or three generations! Is there any end to this? Or must we just like this work under you like slaves till the end? (Cheers). Set some limit. You came to teach us. When we appoint a teacher at home for a boy we ask him within how many days he would teach him—whether in 10, 20 or 25 years. Within two months, within four months. But if the study which should take six months for the boy to finish would, he were to say contrary to our expectation, take one year, we tell him you are useless, go, we shall appoint another teacher (cheers). Then in this manner, on the people—on all people. These officers have control over the people's education and it is their duty to improve them; this duty remains on

one side, they make attempts on the other side. They say that whatever attempts they may make it is impossible for these people to become fit for this work. I think that to place such excuses before the invisible Government is in a manner an occupation of securing one's own interests. If some one were to draw the conclusion that there must be some self-interest in this, that would not be wrong. Why is it so? (They are) men like you, as wise as you. You take them in service, get work done by them; it is not that you exercise less strictness. What is going on in the Khalsa territory? There is no obstruction in the management. Is it obstructed in Mysore? Who are doing the work? The King of Mysore is a Hindu, the minister is a Hindu, the subjects are Hindus, the lower officers are Hindus. (They) carry on the administration of such a large kingdom as Mysore, but it is said that the people of the two districts beyond Mysore cannot carry it on in that manner. (Laughter, cheers.) There are six districts in the Mysore territory, hence it is like saying that six are fit and eight are not fit.

There is fitness in us beyond any doubt (cheers). You may, then, for some reason admit it or not. Well. What authority is there for thinking that we possess fitness? I pointed to a Native State. I tell another thing. Keep yourself aloof for ten years and see whether it can be done or not (cheers, laughter.) If it cannot be done, take (us) under your control after ten years (cheers). You are free (to do so). This thing, too, is not to be done. Hence the only object in saying that the Indians are not fit to carry on the administration is that they are always to be kept in slavery, that they are to be made to do work by labouring like slaves, and that the ways whereby their intellect and their ability may be developed are to be stopped (cheers, 'shame'). There is no swarajya. There is no swarajya. What does it mean? What do we ask for? Do we say 'Drive away the English Government'? But I ask what (is it) to the Emperor? Does the Emperor lose anything whether the administration is carried on by a civil servant or by our Belvi Sahab? (Cheers.) The rule still remains. The Emperor still remains. The difference would be that the white servant who was with

him would be replaced by a black servant (cheers). From whom then does this opposition come? This opposition comes from those people who are in power.

It does not come from the Emperor. From the Emperor's point of view there is neither anarchy nor want of loyalty, nor sedition in this. What does *raja-droha* (sedition) mean? Hatred of the King. Does King mean a police sepoy? (Laughter.) I said some time back that this distinction must first be made. Otherwise, (lit. then) if to-morrow you say 'remove the police sepoy,' would it constitute sedition? Such is the belief of police sepoy (laughter). In the same manner, go up a little, and you will see that the demand made by us is right, proper, just and conformable to human nature. The same has been done by other nations. It has not been done only in our country. *Swarajya*, *swarajya*—what does it mean? Not that you do not want the English rule. There is a mistake at the root. Some one has some object in it. This argument is brought forward by men whose interest lies in deceiving you. Do not care about it at all.

If you think that you are men like other men, when they go to England their intellect and they are put to the test there. Therein we stand higher. What else then comes out? Your intellect may be good, but you do not possess character, courage and other qualities (and) their nature. I admit for a *ghatka* (24 minutes) the absence of nature. But it does not follow that it will not be acquired. (Laughter.) How can their nature at all become such, whose life is spent in service and in service alone? If it be said, he worked as a clerk for 25 years, wrote on the cover (sic) the Sahab's orders, obtained the Sahab's signature thereon, and then he acquired the habit after 25 (40) years; still he will at first find it difficult to do work; this is not denied. But when the system under which such men are has disappeared, it cannot be said that men would not become fit in the next generation. Hence, in my opinion, we are fit for *swarajya*. I shall now briefly tell you what we wish to obtain and what we should demand and conclude my speech.

You know of what sort the Indian administration is. But the thing to be told is that it is carried on in accordance

with a particular law. Its rules are fixed. What are the powers of the Secretary of State? What are the powers of the Governor-General? There are three great parts of the system. The Secretary of State is in England. The Governor-General is at Delhi in India. Under him there is a Governor for a Presidency. For the present let us omit those under him. But the main system is of the above three sorts. If we now begin to consider each, who appoints the Secretary of State? Not we. This arrangement was made according to the policy of the Company's Government. When there was the East Indian Company's rule in this country, all matters were carried on on a commercial principle. The whole attention was directed towards (the question) how might the Company's shareholders obtain a considerable profit? The Company's Directors were in the place of the present Secretary of State. You might say that this was a contract given for governing the entire kingdom.

Under the Peshwas' rule mamlatdars' offices were given under a contract. The Indian administration was, as it were, according to the then law of Government, a trade carried on by the East India Company. They were to derive from it as much profit as possible. The Company's Directors were to be in England. Their attention was directed to the fact that profit was to be given to the Directors, i.e., shareholders. A letter used to come to the Governor-General here to this effect; 'So much profit must be paid to us this year. Realize it and send it to us.' This was the administration. The people's good was not (considered) in it. (It was like) the milkman and his cows. If the cows do not give milk, he says bring (the pot) after filling it by pouring water in it. The administration of India was carried on like that. Subsequently it appeared after discussion that this administration was not of a good sort. And when Queen Victoria—you may say the Parliament—took the administration in their hands, they did not approve of this trading system.

They took it into their hands—this was one part. This system of administration has been formed in accordance with the commercial policy which was in existence when the administration was assumed (by the Parliament) and under which the Directors were in

England and their servants were here. The State Secretary has come in the place of the directors. The Governor-General (has) come in the place of their Governor. Thus, what was done? The Sovereign, the Parliament, took the administration into their hands, but the establishment of employees which then existed has remained just as before. This happened in 1858 after the Mutiny. From that time to this the administration of India has been carried on in accordance with rules and arrangement formed according to the company's policy. If it was really to go to the King, as there was the sovereign, this nature of the company should have disappeared. He is the King and we are his subjects. It is his duty to rule for the good of the subjects. And an arrangement should be made in accordance with the rules—lawful—that may be included in that duty. But this arrangement was made thus—the directors went, the Secretary of State came in his place. Who is to decide how much money is to be spent in India and what taxes are to be imposed? The State Secretary. Such powers are not placed in the Governor-General's hands. He is the chief officer. The Governor are under him. He is a servant. There are other servants under him. And the entire administration must be carried on with the consent of, in consultation with and with the advice of, this State Secretary. Such is the present policy. What happened then? Gradually. This is but a commercial policy. Though the administration went into the hands of the Queen's Government, and though they issued a great proclamation, the sovereign's policy is not on the lines of that proclamation. The sovereign's policy is in accordance with the trading company's policy, the administration of the kingdom is in accordance with the company's policy. And in the meantime the proclamation has no effect. (Laughter, cheers.) Such was the arrangement. At that time our people did not know (it). I think that had the spread of education been then as great as it is now, the people would have contended that since the Queen had taken the reins of Government into her own hands, the administration of the kingdom should, as regards the sovereign and the subjects, be for the good of the subjects. Our people would

then have told that the arrangement made by the company was simply for its own benefit, and that a change must be made in that policy—in that arrangement.

The people continued to make these contentions for many years. To put the matter very briefly, Mr. Dadabhai Naoroji (cheers), who is one of those living persons who saw this arrangement and pointed out its defects, began this work. What beginning did he make? He said: 'What is the difference between the company's (system) and this (system)? We do not (see) any in it. The rules are all made in accordance with the company's policy. Are the people likely to derive any benefit from them?' Then arose these Legislative Councils. They were such that the Governor-General was to appoint us. Originally (the members) were not to be elected (lit. appointed) by the people. Gradually your men became members (lit. officers) of the Municipality and of the Legislative Council. Still the final keys are in their own hands. Discussion may be held in the Legislative Council. You have full liberty to hold a discussion. You may hold a discussion about spending the money in this country. We shall decide whether it should be (so) spent or not. Subject your mouth and mind to as much exertion as possible, we have no objection to it. Be awake throughout the night, prepare you speeches. Instead of printing them in a newspaper, we shall publish them in the Bombay (Government) Gazette. This is the only difference. Nothing is got from this. The hope of getting is held out. There is a shloka (stanza) in the Mahabharat which says "hope should be made dependent upon time." Rights are to be given to you when you become fit. We do not wish to remain in India. When you become fit, we shall give the bundle into your possession and go to England by the English steamer (cheers). Such a time limit should be laid down. We shall give in two years. We shall give in ten years. Such a time came afterwards. 'Time should be coupled with obstacles'. Ten years were mentioned. These days passed and were very wearisome. We are obliged to make them fifteen. 'Hope and time should be coupled with an obstacle'. An obstacle came. You yourselves must have brought it.

We did not bring it. We were awaiting good time. An excuse should be coupled with it. The excuse came. How did it even come? It is an excuse, nothing can be said about it. Some quite different cause should be shown. This is a sort of policy. When you do not mean to give, how do you speak? It is not the case that this is written in the modern works on morality and politics. Only the old tradition has continued.

Thus this bureaucracy has been cajoling us. For the last five or fifty years the State Secretary and the Governor-General too have been cajoling us in this manner—have kept us afloat. As soon as you proceed to make some noise, (it is said) there were five members, tomorrow we shall make them six. What is the benefit to us of raising the number from five to six. One of our men is only to be made to pass time there for nothing for a few days (cheers). There is no more advantage than this. (If) you object to six (they say) we make them eight. We raise our ten to twelve, if necessary (Laughter and cheers). The people are already convinced that this matter cannot be disposed of in this manner. Whatever rights you may have to give, give them to us absolutely, however great your own powers may be. If the management of the Education Department alone be considered (it will be found that) most of the subordinate servants are from among us only. There is a Saheb at the head. Why is he kept there? With a view to restrain their mouths and the scope of their intellect. Even if twenty years' service be put in, the work will not be done without the Saheb, that poor man begins to say so. Such men are to be prepared. This is the inward object, though it may not be open, of the present (system of) administration. Two distinctions are to be seen in these. When a gardener is asked by someone to prepare a garden here beyond this (place) he looks for (flower) pots. When big forests are to be prepared under the Forest Department, pots are not required. Bags of seed are bought and emptied. Trees grow everywhere to any extent. Some (of them) grow small, some big.

This present arrangement is like that. Owing to this arrangement the trees amongst us do not grow. Nay, care is

taken that the trees planted in pots look pretty (and) their flowers can be plucked by the hand. He is educated in such a way that such pretty trees may grow. In such a manner is he treated and made to work. And then after 25 or 30 years are past he begins to say "I am really not fit for this work." We do not want this system. We want the English Government. We want to remain under the shelter (lit. umbrella) of this rule. But we do not want the State Secretary who has been created as a son-in-law (cheers). At least we want our men, (men) elected by us, in his council. This is the first reform that must be made. Similarly it must be decided according to our opinion who is to expend India's (revenues), how much money he is to collect (and) how many taxes he is to impose (cheers). We say, there must not be those taxes. They will say how will the expenditure be met? That we will see afterwards. We know so much that expenditure is to be made according to the money (we) may have and (lit. or) that money has to be raised according to the expenditure undergone. We understand this. We will afterwards see what arrangement (should be made). The second principle of Home Rule is that these powers should be in the people's hands, in the hands of good men, viz., in the hands of men elected by the people. At present such a (great) war is going on in Europe. The Emperor does not decide how much money has to be spent on the war. Mr. Asquith decides it. If there is a complaint against the work done by Mr. Asquith, it goes before Parliament, and if Mr. Asquith has committed a mistake, he has to tender his resignation. Will it be sedition, if he has to tender his resignation? There is difference in the arrangement, there is difference in the organisation, there is difference in the system. And we are asking for such a change in the system. The rule will fall, the rule will go away, these thoughts are utterly foreign to us, they do not come within our limits, our reach, our view.

And we do not also wish it. I again say, if the nation is to get happiness, if the thousands of complaints that have arisen to-day are to be removed, then first of all, change this system of administration. There is a saying in Marathi "Owing to what did the horse become restive?"

Owing to what did the betel-leaves rot? Owing to what did the bread get burnt".

There is one answer to it:

"Owing to not turning. The leaves ought to have been turned, the bread ought to have been turned. Had the horse been turned, it would not have become restive."

The root of it is that complaints about forests, complaints about abkari, complaints about kulkarni vatans—(these have arisen) because authority is not in our hands. To state it in slightly changed words—because (we have) not swarajya (cheers). That we should have swarajya for us is at the root of it. Then (we) need not dance according to the wish of anyone. This may happen even in swarajya, I do not deny it. When we have deficiency of money and powers are placed in your hands, you will increase the tax; you will increase (it) altogether voluntarily. Whence is the expenditure to be met? But as it will be increased voluntarily, it will not oppress our minds. Learned aliens may tell us, when we are passing like this through this door, that we should not pass through this door but through that; but if any one comes and stands there and (begins to) tell us not to go through it, then we have to go out by giving him a push. The very same is the case with swarajya. This is the obstruction of the bureaucracy. We do not want such obstruction. The demand for swarajya is such that it has nothing to do with sedition. It has nothing to do also with the invisible Government. This domestic arrangement should be managed by you yourselves and by doing so what will happen is that in the first place your minds will remain in peace. Whatever you have to do you will do with the thought that you are doing it for your good. Nay, you will also reduce the expenditure. I do not think that in any Native State a Collector gets a pay of Rs. 2,500. If there is any place in the world in which a man doing the work of a Collector gets the highest pay, it is India (cheers). To give Rs. 2,500 as pay to a Collector would, under the former rule, have been like giving an annual jahagir (to him) of about Rs. 30,000. Have we ever given in our swarajya such a jahagir of Rupees 30,000? Rs. 30,000 is not a small amount. There are reasons for it.

What reason is given? Bear it in mind that there is some reason or another for everything. This (man) has

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to send Rs. 2,500 to England for his children, etc. For your welfare (they) come from a cold climate to a hot climate (and) get their health spoilt. Must not then pay be given to them? They have laboured so much, made such self-sacrifice, (and) suffered so many hardships, and you would not pay them money? When this is once told it appears to be right at first sight. But now the principal question is, who told them to come here from there? (Cheers). We did not call (them). You do such work as you may be fit to do. We do (lit. may) possess as much fitness as you have, but we shall be able to do the work on less pay. Men can be had. Then why (give) so much pay to him? We do not need it. We think that we do not get to-day money for education. The excuse of "no funds" which is brought forward in connexion with the execution of works of public utility will first disappear. The business will go on unobstructed just as at present. In the beginning it will not go on so unobstructed. Perhaps it may be less by an anna in the rupee. Still the good impression (lit. fine thing) that will be produced by (the thought) that the (business) has been carried on by the people, is of greater value. In this manner good management is to be asked for in this (administration). Amendment is to be brought about in the present law, it is to be brought about through Parliament. We will not ask for it from others. We have not to get this demand complied with by petitioning France. The Allies may be there, we have not to petition them. The petition is to be made to the English people, to the English Parliament. This state (of things) is to be placed before them. We have to do whatever may be required for this. If you carry on such an effort now for 5 or 25 years, you will never fail to obtain its fruit. Moreover, such a time has now arrived on account of the war that is now going on that some such effort must be made as will increase the value of India, India's bravery, India's courage, and India's stability. If the fact that they themselves are making this effort comes to the notice of Government, then there is hope of our demand soon proving fruitful.

I have therefore purposely brought this subject before you. The subject is

being discussed elsewhere also. The League which we have established for this purpose is such that I myself or some one else will have occasion to place the subject (before the people) at every place, if not to-day some days afterwards, for carrying on this work. Let this subject be always discussed by you, always think about it, get its usefulness explained, and carefully consider how much of loyalty (and) how much of disloyalty is in it. This is what I tell you on the present occasion. Though what I have to say may be much more than this, still I have told you its substance in a brief manner. If the consideration of this be begun among you, be begun in Maharashtra, be begun in India, then some day or other this work will succeed; and even if this matter lies in God's hands, still it is necessary. I admit that it does not lie in our hands. But the effect of action (lit. karma) cannot fail to take place in this world. The effect of action may not be obtained so soon as I say, may not be obtained before my eyes, perhaps I may not be benefited by it. But this action must have its fruit (cheers). According to the law of action, when a certain action is done another results from it, (and) a third one results out of that. Such succession goes on. Time will be required, there will be delay. But do we ask at all that we should have moksha before our eyes?

Again do we ask for it with the thought that we should have it at the hands of a certain person? Only just now a Resolution was passed in our Conference (that) the parties of Moderates and Nationalists are not wanted. That is to say, it is the same to us to whomsoever swarajya is given. There is no objection even (if powers) be given to your sepoy to-morrow. You may say, how will the sepoy exercise such a great power? The sepoy is to die some day or other and then we will see (cheers). We want rights. We want a certain sort of arrangement giving happiness. We will get it. Our children will get it. Make the effort that is to be made. Be ready to do this work with the thought that it belongs to you. I am sure that by the grace of God your next generation will not fail to obtain the fruit of this work, though it may not be obtained in your lifetime (cheers).

Lecture of 31st May 1916.

Gentlemen, before saying a few words to you it is my first duty to thank you very much. It is my first duty to thank you for the honour you have done to me by calling me here (Ahmednagar) and for the address you have presented to me. Whatever the motive with which you have conferred the honour upon me, the few words, which I have now to tell you, relate to my work. Perhaps this may appear strange (lit. contrary) to you. You have called me here and (if) I make a statement about my own work before you, that would be a sort of impropriety. Should you think that Mr. Tilak came here and told people his own things, (I say) I do not hesitate at all to tell them at this place since the things which I have to tell you are of as great an advantage to you as they are to me. Till now controversies and discussions about the state of our country have taken place in various ways and at various places. What is beneficial to the people in general? Many things are beneficial. Religion, which relates to the other world is beneficial. Similarly, morality too is beneficial. Provision for one's maintenance is beneficial. Our trade should expand, the population should increase, there should be plenty and that plenty should safely fall into our hands—all these things are desired by men. But it is not possible to discuss all these things in the short time allowed to me.

I will therefore say a few words before you about such of the above things as are important and are considered important by thousands of people (and) about a subject which is now discussed on all sides. This subject is swarajya (cheers). Those things which relate to our homes we do authoritatively in our homes. If I desire to do such and such a thing, if it be merely a private one, I have not to ask any one about it, nor to take anybody's permission nor is it necessary to consult anyone else. That is not the case in public matters. As is our own good, just so is the good of all people. If we consider how people would begin to live well and how they would attain a condition of progressive improvement we shall see that, whatever things we take (for consideration), we are handicapped in consequence of there being no authority in our hands.

If a railway is to be constructed from one place to another, that is not under our control. As for trade, I might talk much about giving encouragement to such and such an industry, but it is not wholly in our power to acquire knowledge of that industry at the place where it is carried on, to lessen the trade of those people in this country and increase our own trade. Whatever thing we may take it is the same with it. We cannot stop (the sale of) liquor. There are also some things which are not wanted by us or by our Government, but the course of the general administration is such that it is not in our power to make any change—the slightest change—in it. We have till now made many complaints and Government have heard them; but what is the root of all the complaints? What things come in the way of improving our condition as we desire (and) what is our difficulty—this has been considered for about 50 years past, and many wise people have, after considering this thing, discovered one cause of this, which is that our people have no authority in their hands. In public matters, different (lit. many) people have different opinions. Some say: "Do you not possess authority? Do not drink liquor, and (all) is done". The advice is good (lit. sweet) indeed, but stopping all the people (from drinking liquor) cannot be done by mere advice.

This requires some authority. He who has not got that authority in his hands cannot do that work. And if it had been possible to do the work by mere advice, then we would not have wanted a King. Government (administration) has come into existence for giving effect to the things desired by a large number of people. And as that Government is not in our hands, if anything is desired by thousands of you but not by those who control the administration, that thing can never be accomplished. I had come here on a former occasion. What about the famine administration (of that time)? When (lit. on which day) Government came to know that the weavers sustained great loss during famine, some steps were taken about it. We have lost our trade. The business of commission agency used to be carried on formerly; it is not that commission agency (business) did not exist before,

nor that it does not exist now. The business of the agents is carried on at present. The difference is that while at that time you were the commission agents of our trade, you have (now) become the commission agents of the business men of England. You buy cotton here and send it to England and when the cloth made from it in England arrives, you buy it on commission and sell it to us. The business of commission agency has remained, but what has happened in it is that the profit which this country derived from it, is lost (to us) and goes to the English. The thing (is) that the men and the business are the same (as before) but owing to a change in the ruling power we cannot do some things. Such has become (the condition) that such things as would be beneficial to the country cannot be carried out. At first, we thought that since the English Government was as a matter of fact alien, (and) there was no sedition in calling them so there would no sedition whatever nor any (other) offence in calling (alien) those things which are alien. What is the result of alienness? The difference between aliens and us is that the aliens' point of view is alien, their thoughts are alien, and their general conduct is such that their minds are not inclined to particularly benefit those people to whom they are aliens. The Mahomedan kings who ruled here at Ahmednagar (I do not call Mahomedans aliens) came to and lived in this country and at least desired that local industries should thrive.

The religion may be different. The children of him who wishes to live in India (also) wish to live in India. Let them remain. Those are not aliens who desire to do good to those children, to that man, and other inhabitants of India. By alien I do not mean alien in religion. He who does what is beneficial to the people of this country, be he a Mahomedan or an Englishman, is not alien. "Alienness" has to do with interests. Alienness is certainly not concerned with white and black skin. Alienness is not concerned with religion. Alienness is not concerned with trade and profession. I do not consider him an alien who wishes to make an arrangement whereby that country in which he has to live, his children have to live and his future

generations have to live may see good days and be benefited. He may not perhaps go with me to the same temple to pray to God, perhaps there may be no intermarriage and interdining between him and me. All these are minor questions. But if a man is exerting himself for the good of India, and takes measures in that direction, I do not consider him an alien. The Government is alien. At first I thought that there was nothing particular in this. The Peshwa's rule passed away and the Mahomedan rule passed away, (the country) came into the possession of the English, but the king's duty is to do all those things whereby the nation may become eminent, be benefited, rise and become the equal of other nations. That king who does this duty is not alien.

He is to be considered alien, who does not do this duty, but looks only to his own benefit, to the benefit of his own race, and to the benefit of his original country. If anybody has charged this Government with being alien he has done so in the above sense. How then is this sentiment (of alienness) to disappear? At first hundreds of questions arose. Agricultural assessment then increased, the Forest Department was organised in a particular manner, the Abkari Department was organised in a particular manner—about all these things we have been constantly complaining to Government for past 20 or 25 years. (But) no arrangements about the different departments, the different professions, the different trades and the different industries were made (accordingly). This is the chief question of the past 50 years. While looking out for a cause of this we at first believed that when we informed this Government of it, it would at once proceed to do as we desired.

The Government is alien. It does not know (the facts). When five or ten of our prominent men assembling together tell Government the latter will understand it. It being alien, it cannot understand it. As soon as the Government is informed of this, it is so generous minded and wise that it will listen to what you have to say and redress (the grievances). Such was our belief. But the policy (lit. conduct) of Government during the last 50 years has been the cause of the removal of this belief.

However much you may clamour how-
ever much you may agitate, whatever
the number of grounds you may show,
its sight is so affected as not to see the
figures drawn from its own reports and
set before it. The same arguments and
the same grounds do not meet with its
approval. If we say anything to it, it
sticks only to what may be adverse to
our statement. Perhaps someone may
come and tell you that there is noth-
ing to wonder at in this. Whether
the Mahomedans or the Hindus or the
Peshwas or the Emperors of Nagar may
have been (lit. may be) your rulers,
those kingdoms have been broken up
and now the rule of the English has
been established. Of course those people
do just what is beneficial to them.
Why then do you complain about them?
This is sure to happen. Such is the
opinion of several people. This your
outcry only becomes the cause of giving
pain to Government and in a manner
disturbing its mind. For this reason do
not raise this outcry and accept quietly
what it may give. Accept gladly what
little (lit. quarter of bread) it may give
and thank it. Such is the opinion of
several people.

I do not approve of this opinion. My
opinion is that whatever be the Govern-
ment, whether British or any other,
it has as Government a sort of duty to
perform. Government has a sort of
religious duty to perform, a sort of res-
ponsibility lies on its shoulders. I say
that when a Government evades this
responsibility it is no Government at
all. Government possesses authority.
All the power possessed by Government
be it acquired by it by fighting or be it
conferred (upon it) by the people. Still
Government has a duty (to perform).
As we have a duty, so those who are
called Government have also a duty.
They must do certain things. The
Government has already admitted cer-
tain duties. Does not Government do
such works as constructing roads, estab-
lishing post offices and telegraphs? It
does. If to-morrow some one were to
say:

"If Government does not construct roads, it
is its pleasure. It may construct them if it
likes, but not if it does not like,"

then all of you who are assembled here
will find fault with him saying:

"If these things are not to be done (by Govern-
ment), why do we pay taxes? If the Govern-

ment will not utilize for the people's conveni-
ence the taxes levied from us, it has no autho-
rity to take any taxes whatever from us. Govern-
ment take these for our benefit."

When any persons argue before you
that the Government is good what do
they show? The question is always
asked. This our Government has con-
structed roads made railways, estab-
lished telegraphs and post offices—are
not these conveniences made for you?
Why do you then raise an outcry against
Government? I do not say that these
things have not been done, but that
those that have been done are not suffi-
cient. These things have been done, done
well (and) have been done better by the
British Government than they would
have been done by the former Govern-
ments—this is an honour to them. But
should we not tell (it to do) those things
which it does not do? But that is not
a real Government which considers it-
self insulted when told of those things
which have not been done and a desire
to do which is not apparent even now,
which does not direct its attention to
them though told in many ways and
which thinks that we should not tell
those things to it. What then is meant
by a real Government? This must be
considered a little. There is a vast
difference between the present system
and the old system. At present an effort
is being made to create a sort of erro-
neous conception. Neither the Collector
nor the civilians arriving (here), who
are called the bureaucracy in English,
are Government. A Police sepoy is not
Government. It does not constitute
any sedition whatever to say:

"Do something if it can be done while main-
taining the British rule which is over our coun-
try without harm being done to that rule and
without weakening it."

We want the rule of the English
which is over us. But we do not want
these intervening middlemen (lit. keep-
ers of granaries) (cheers). The grain
belongs to the master, the provisions be-
long to the master. But remove the
intervening middleman's aching belly and
confer those powers upon the people so
that they may duly look to their domes-
tic affairs. We ask for swarajya of this
kind. This swarajya does not mean
that the English Government should be
removed, the Emperor's rule should be
removed and the rule of some one of
our (Native) States (should be estab-

lished in its place). The meaning of swarajya is that explained by Mr. Khaparde at Belgaum, viz., we want to remove the priest of the deity. The deities are to be retained. These priests are not wanted. We say appoint other priests from amongst us. These intervening Collectors, Commissioners and other people are not wanted. Who at present exercises rule over you? The Emperor does not come and exercise it. He is in England. If some facts were communicated to him, it is his wish that good should be done to you. Why then is not good done to you? Hence we do not want these priests (cheers). Those people are clever. You say that no priest is wanted. They will say, "we have passed examinations: We do many things." All these things are true. But their attention is directed more to the remuneration belonging to the priest. Hence this priestly office should remain in our hands. The position of the Badwas of Pandharpur and these (people) is the same (cheers). Will there be any loss to the Emperor if the said priestly office does not remain in the hands of the bureaucracy who are endeavouring to retain it? There will be none. Some will say that the English people belong to the Emperor's race. But after we have become the Emperor's subjects he does not make any distinction between the English subjects and the black subjects. He does not wish to make it. The meaning of the word swarajya is Municipal Local Self-Government.

But that is a farce. It is not sufficient. When an order comes from the Collector, you have to obey it. He (Collector) has power to meddle. He has power to call the President and tell him to do such and such a thing. If the President does not do it, (the Collector) has power to remove him. Then where is the swarajya? (cheers). The meaning of swarajya (as stated) above is retention of our Emperor and the rule of the English people, and the full possession by the people of the authority to manage the remaining affairs. This is the definition of swarajya. What we ask for is not that the authority of the English should be lessened, nor that the English Government should go away and the German Government should come in its place. On the contrary, the present war has proved and the whole world has seen

that it is not our wish that the German Government should come here. Nay, in order that the rule of this Government should remain here permanently, thousands of our people are to-day sacrificing their lives in the most distant and cold climes (hear, hear, cheers). What is left then? If in order that this rule may remain and that this rule should not go away and the rule of the German people should not come in its place, we pay money—be it according to our means—though we are not as wealthy as the English. According to our ability, our fighting men are going (there) and sacrificing their lives and in this way exerting themselves. France, Germany and (lit. or) other nations are commending and applauding them (cheers, hear, hear). By shedding our blood we have proved our desire that our loyalty to the English Government should be of this kind (hear, hear and cheers).

I do not think that any man can adduce stronger evidence than this in his favour. Thus to-day it is an undoubted fact that we want here the rule of the English alone and accordingly we are exerting ourselves. If such is the state of things, why should not these intervening people who have been appointed be removed and why should we not get the rights possessed by the people in other places within the British Empire? We are not inferior to them in point of bravery and education, we possess ability. Such being the case, why should we not get the rights? Why should the Emperor make a distinction between his black and white subjects? Who has given such advice to the Emperor? The peculiar feature of the British constitution (lit. rule) is that the Emperor acts on the advice of the people. Why should the ministers give him such advice? At present those who possess power, i. e., the bureaucracy are white. When a black man goes among them he too becomes like them. Under the present system, if a native on his arrival from England after passing examination be appointed to be a Collector, he, after going among them, becomes just like them. Do not think that I am speaking only about the whites. We do not want this system. What does it matter if a man or two goes among them? He cannot do anything in particular. Therefore, this system must be done away with. We would

not be satisfied by the appointment of one or two persons. Let that be. Who introduced the system? The Emperor did not introduce it. The Queen's proclamation as promulgated is of one sort (lit. on one side) and the present system is of another sort (lit. on one side). At present it is not at all left in our hands to bring about our own good. Were we to think that encouragement should be given to swadeshi goods by imposing duty on certain imported foreign goods that is not in our hands. Were we to think of starting such and such industries required in the country (or) of importing paid teachers from foreign countries, that thing is not in our hands. What a small thing this is.

It is necessary that all people should know reading and writing. Whether a man be a Mahomedan or of any (other) religion or of any caste, he ought to know a little of reading and writing. This thing is now acknowledged by all people throughout the world. There is now no doubt about this. By knowing reading and writing a man derives at least some benefit. No one requires to be told of this anew. Then why is not that thing done here? Because there is no money. Who gives this excuse? This excuse is given by the bureaucracy. Their pay is Rs. 2,500 and if it is to be raised to Rs. 3,000, then there is money. The same was the case with exchange compensation. When the price of the rupees or (silver) fell, six crores of rupees were brought out by Government on account of exchange. At that time money was found. Unless you have authority in your hands these things which are taking place cannot be got over. There is no money for education, but (lit. and) there is money to pay a salary of Rs. 2,500 to the Collector. Moreover the present bureaucracy does not consider that thing from the point of view from which we would consider it if authority were to come into our hands.

At first we were told that money should be spent on education. When people begin to know how to read and write, the number of offences committed falls by thousands; they carry on their dealings well; they understand what is of advantage and what is of disadvantage to them. When people become (fit) in this manner an officer of Rs. 2,500 will not be necessary to govern them. One

of Rs. 500 will do, and we shall be able to spend Rs. 2,000 on education. In no (other) country are there so highly paid officers at present. The Viceroy who comes to govern India gets Rs. 20,000 a month, while the Prime Minister of England gets Rs. 5,000. He who remains in England manages the affairs of the whole Empire gets Rs. 5,000, while he who carries on the administration of India here gets Rs. 20,000. Why so? There is no answer to this. This (is so) because this thing is managed at the cost of others (lit. direct) (cheers). This is India. Go and eat. If any shop belonging to (other) people is made over to you for management, you will pay the employee a salary of Rs. 100 if he belongs to your community or caste, while you would pay him a pay of Rs. 50 in your own shop. In this way the present arrangement is being carried on. We are not at all benefited by this arrangement. Thus it is not the case that these things have come to our notice for the first time. It is 50 years since the things came to our notice. When the National Congress was held at Calcutta in 1906, Mr. Dadabhai Naoroji (cheers) stated this distinctly. He gave it as his 50 years' experience that for counteracting this present irregularity and the sort of injustice that is taking place in India, there is no other remedy than that the power should pass into the people's hands.

He called it self-Government. And in the hands of the people. We must decide upon the arrangement as regards what is to be done in our homes, what is to be done in our villages, what is to be done in our country and what is to be done in our Presidency. If we decide about this, it will be done at a small cost, it will be done well and our decision, as regards in what matter we should expend more money, and in what matter less, will be more beneficial to the people. The bureaucracy says that we do not possess knowledge (as if) they alone possess it. Their first lookout is to see how their pay will be secure. When money comes into the treasury the expense on account of their pay must be first defrayed. Their military expenditure must be first defrayed. They must be first fully provided for. If money remains after this, it is to be applied to education. They do not say that edu-

cation is not wanted. Education is not a bad thing in their eye. But the people are to be educated and their (other) conveniences are, if possible, to be looked to after all (the above) expenditure is defrayed. This is to be thought of afterwards. We shall first consider whether (you could) manage things or not if power were to come into your hands. If you think that more pay has to be paid to these people, then reduce it and tell them that they will have to do the work for the country. When all these things will be considered in this manner, we shall have in our hands the opportunity of bringing about those things which it is desirable to bring about. This is mere speculation (lit. consideration). Where is your difficulty? There is a common saying in Marathi : A certain man asked three questions.

Why (lit. where) does the horse become restive, why did betel-leaves rot—the story occurs in the third book: it was there formerly, I do not know whether it is there now.—He gave a single answer to two or three such questions, which is, “owing to not turning.” Similarly, (why) is (not) the consumption of liquor reduced in our Presidency, why are the people subjected to zulum in forests, why is money not available for education?—All these (questions) have one answer, and it is this : “Because you have no power in your hands” (cheers). And as long as this power will not come into your hands, so long there will also be no dawn of your good fortune. Whoever may be the Emperor, we speak not anything about him. But we must do those things which relate to business, trade, religion and society. Unless the power of doing those things comes partially into our hands—in the end it must come fully—unless it comes fully into our hands, it is impossible for us to see a time of plenty, the dawn of good fortune, advantage or prosperity. Water cannot be drunk with others’ mouths. We ourselves have to drink it. Similar is the present arrangement (that of drinking with others’ mouths). We ourselves must draw our water—the water of our well—and drink it. If that well belongs to Government, a tax of a rupee per month may, if necessary, be paid. But we want power. There are no means of salvation for us unless we have it in our possession. This principle

of politics is almost settled—proved—from the point of view of history, morality and social science. Now (lit. then) you may ask why it was not told to you for so many days. I have to say a few words about this. That power should come into our hands or the time of its coming into our hands is approaching (lit. beginning to be seen). Up till now the generality of people in England thought of deriving as much profit from India as possible (and that) India was a sort of burden to them.

The people in England used to think that the thirty crores of people in India would overthrow their rule some time or other, (that) they should be disarmed (and that) they must be kept in slavery and under control as much as possible. But that condition is now changed. Owing to the war which is now going on in Europe, it has begun to be thought that unless all the many parts of the British Empire unite together, that Empire would not attain as much strength as it should. It has so happened now that a consciousness has been awakened in them that they stand in need of aid from other countries, called Colonies belonging to them—Australia, Canada, (and) New Zealand, which are inhabited by Sahebs. If you take advantage of this awakened consciousness, you too have this opportunity of acquiring some rights. No one tells you to obtain these rights by the use of the sword. But to-day the nation’s mind has undergone a change. India can give some help to England. If India be happy England too will acquire a sort of glory, a sort of strength and a sort of greatness. This consciousness has been awakened in England. If no advantage is taken of this awakened consciousness at this time, such an opportunity will not occur again. The bureaucracy considers this to be bad. Who will be the loser in this? Not the Emperor, but the bureaucracy. They therefore consider this thing to be bad and they are now telling (lit. advising) us that we are not fit for swarajya, and that therefore they have come here. As if there was no swarajya anywhere in India when they were not here!

We all were barbarians and ready to cut each other’s throats. There was no system of administration under the Peshwa’s regime. There was no system

of administration under Mahomedan regime. We were not able to carry on State administration, we were not able to construct roads. We did not know how the people might be happy. Nana Pharnavis was a fool, Malik Amber was a fool, Akbar and Aurangzeb were fools. Therefore these people have come here for your good and you are still children (laughter). Let us admit for a moment also that you are children. When are you now to become grown up? In law when one attains his 21st year one is considered to be grown up. Though these (people) have ruled over us for fifty years we have not been able to become grown up. What then did they do for fifty years? If the people of India were children whose duty was it to educate (lit. make wise) them? It was their duty. They were the rulers. I go so far as to say that they have not done this duty—hence not only are we children, but they are unfit to rule (cheers). This alone is good that those people who could not improve (the condition of) their subjects during fifty years should give up their power and make it over to others. If there be a manager of your shop and if he performed the duty of munim for fifty years, but there was only loss continuously for fifty years, what would you tell him? Sir, give up your place and go away. We shall look to our own management. Another may be of a lower grade. Though he may be less clever, he will at least know that in managing a shop there should at least be no loss. This at least he must know. What (those) people tell us, viz., that we have not become fit, proceeds from selfishness. If what they say be true, it is in a way disgraceful to them. They are being proved to be unfit. And if it be false, they are selfish.

We can draw no other conclusion from this than the above. What is meant by "we are unfit"? What is the matter with us? Our Municipal management is tolerated; if some one comes from England after passing examination and becomes a Collector that is tolerated. They discharge (their) duties and Government commends them. But when the rights of swarajya are to be given to the people, to tell all people, crores of people plainly that they are unfit (lit. to give a certificate of unfitness) is to make an exhibition of one's own unfitness (cheers).

Besides this, objections of many other sorts are taken against swarajya. In the first place, I have already said that they unhesitatingly (lit. at once) decide that the whole nation is unfit. If we say ("hold an examination,") no examination too is held. "Unfit, unfit"—what does it mean? Set your men to work and set our men also to work. See whether they do or do not work properly. No opportunity to work is given and (yet we) are called unfit. Are even those, who have been given an opportunity, found unfit? There are members in the Legislative Council, are they unfit? Have they ever called themselves unfit? Have you ever called them (unfit)? No. What does then "unfit" mean? You do not mean to give. In order to say there is not buttermilk, is deceit necessary? To-day being Sunday, there is no buttermilk—such is the shuffling that is going on now. I want to ask you whether you without allowing that shuffling are prepared or not to make a resolute demand. If you are not prepared to ask, if you do not make urgent solicitation about this—if you throw away the present opportunity—such an opportunity will not come again for 100 years. Therefore you must be prepared. I know that if after being prepared we spoke a little forcibly, some Police sepoy may say "O you": (this) is not unlikely. But it must be put up with. There is no help for it. We have no power in our hands. We cannot say to the Police sepoy, "you are a fool, go back." He obeys the Police Inspector's order.

But I can tell you that if you, people of all castes and religions, become united and at this time make this demand of Government resolutely and unitedly, press (it) earnestly, be prepared to bear any expense that may be necessary for this, (and) proclaim not only to Government but to the whole world that unless your demand be granted you would not be satisfied nor remain contented—if you possess so much resoluteness, I am sure that by the grace of God you will not fail to have the demand granted to you pretty soon. (This) will be (lit. is) the fruit of your resoluteness. Whether in religion or in politics, resoluteness is required and that resoluteness of mind does not come without courage. It will not do to say, "How will it be?" Whe-

ther good or evil may result, we want this very thing. We will ask for this very thing. For this we will collect money and undergo any expenditure or exertions that may be necessary, and we will not stop this agitation till this our demand is satisfied. If this work is not completed within our lifetime, our children also will keep up this same agitation. When there is such devotion for this work, only then fruit will be (lit. is) obtained. Without devotion, no fruit is obtained from God, from King, in this world (or) in the next world. If you do not possess this devotion, no fruit will be obtained though strenuous exertions be made in this manner. First, devotion is required. (Both) rich and poor must possess devotion. The poor must help in their own way, the rich must help in their own way. Those who possess intelligence must help by means of intelligence. Every man must bear this thing constantly in mind. If you do not bear this (lit. such) thing constantly in mind, if you do not prepare yourself to make exertions, then it will be sheer folly to blame others for the failure. Perhaps the word folly may have been disliked (by you).

I uttered it in the heat (of speaking). But my firm belief is that we have not yet begun to make efforts as strenuously as earnestly and as devotedly, as we should have. If a Saheb were to ask (lit. tell) whether there would be confusion or not if powers were given to us, we say yes, yes. We have no men! The men are not prepared! And then we laugh at the Saheb in our house; we must laugh there (cheers) (laughter). It will not do to laugh in our house. The reply must be given just to his face. We must be prepared to maintain the things which we consider to be true and tell them to the people, to the officers, and even to the Emperor. On the day on which you will be ready (to do this)—particularly in these days after the war is over—the administration shall have to be changed in some respects at least. If the administration be like the present, England cannot grant any authority among European nations. At present England is the most powerful of all. The English Government is the most powerful, but to keep it so, change must necessarily be made in the present administration. As a matter of fact

they say, "make that change," India does not say that the change should be made. Some defects or others are found therein. I stood up today; another will stand to-morrow and say that your good does not lie in this. The arrangement which exists at present is itself good. There is the benign Government. The bureaucracy is wise. Therefore if you act in accordance with their principles, that would be well. If you wish to remain slaves, do so. No one says, do not. What is the use of giving advice to him hundreds of times who likes slavery? He who is willing to remain in slavery may do so freely. But this is not the condition of citizens. This is not the condition of traders (lit. this condition does not apply to traders). This is not the condition of intelligent people.

This is not the condition of people of any religious such as Musalmans, etc. It is not the case that it applies only to one class, only to Muhammadan merchants. The thing which I am going to tell is not for Musalmans, for Hindus, nor for traders. It applies to all. There is only one medicine for all people. That medicine is power; take (it) in your possession. When it comes into your possession, if there be any disputes between you and us, we would be able to settle them. After the power has come into our hands, there would be much to settle them. If there be any difference of opinion in religious beliefs, that too we will remove. We want power for this. We want power to settle disputes. It is not wanted for increasing them. Aliens do not know as much as we do what we have to do for our country. Their point of view is different. Hence, British Government being maintained at the head, one and the same Emperor will rule over India as he does over the British Empire. But introduce here an arrangement similar to that in other Colonies.

There, in those Colonies, they have got in their own hands all the power, the right of ownership, (and) the power to make laws. That does not affect the Emperor. There is no attempt to overthrow the British Government. But this is an attempt to make the British rule more pleasing to the people. Some people will lose their means of maintenance, that is not denied. We do not

think that the Emperor has reserved India for those people.

The present arrangement has come into existence for some reason. It must go away. The Emperor ought to give powers into the hands of the people and without making any distinction between Indian and British subjects, between the white and the black subjects. As they are the Emperor's subjects, so are we too his subjects. We must become as happy as they. The thing which some wise, learned and thoughtful people have now decided to be the key of all these, is swarajya. The time for it has now arrived. I have explained to you the meaning of it. I have told you how its time has come. But though all (things) may exist, your resoluteness is the final thing. The opportunity (lit time) which has come will be lost. Though the arrangement of which I speak be in contemplation, you will not get it. There must be resoluteness on your part. Fortunately the thing about its acquisition is that an agitation of this kind has now begun. Recently we have established at Belgaum an institution to work for swarajya. An institution has been established in Madras. This subject is already before the Congress and it will dispose of it one way or the other. But though the several Provinces make their arrangements and render help to them, at least (you) must show so much courage that if some one—the Collector, Commissioner, etc.—were to ask 'what do you want? (he should be told): 'We want power, there must be power in our hands.' Government servants should be considered to be people's servants. Do not think that when in future power comes into your hands, you are not to entertain Europeans as servants. If he can work well, we shall keep him and we shall pay him what we may think proper. But he must be our servant, we are not his servants.

If we entertain this desire and make efforts for it, then this thing is capable of accomplishment. For this give the help that may be required. Be prepared to render such assistance as may be required to those who may come to speak to us in connexion with this. And when you are thus prepared—people of different places, not only of Bombay, Poona, Nagar, but also of Bengal, Madras, etc.—if people of all places be prepared,

this thing is feasible. To accomplish it, to accomplish it soon, begin to work for it. Having told this much to you, and expressing a hope that the time for India soon to see some fruit or other in accordance with the above will arrive and asking your forgiveness for any mistakes I may have committed in my lecture or for any taunting words that I may have uttered respecting you, I thank you heartily. (Cheers).

Lecture of 1st June 1916.

I had thought that I would probably not have to deliver another lecture after the one delivered here yesterday. On that occasion I have already told as many of the two or four common things about swarajya as could be told within an hour. But this subject is such a one that, not only one, but even ten lectures on it will not suffice. Therefore I am today going to speak again about two more things about swarajya which were not told yesterday, in such a way that the very same subject would be made more clear, would be better understood and the people's ideas (about it) would be more distinct. My general opinion is that what reforms we want are reforms relating to swarajya. You may perhaps know the story (lit. maxim) about the old woman. It is to the following effect: That old woman, after the deity had been propitiated, considered as to what she should ask, and prayed for the following boon: The deity should give me such a boon that I would actually see my grandsons dining in the dishes of gold, that is to say, she should remain alive till that time, that she should have a son, that he should earn wealth, etc., etc. In this small boon the whole object is included. Similar is the case of swarajya. If we do not get swarajya, there will be no industrial progress, if we do not get swarajya there will be no possibility of having any kind of education useful to the nation, either primary or higher. If we do not get swarajya, it will not do merely to advance female education or secure industrial reform or social reform. All these are parts of swarajya.

Power (is wanted) first. Where there is power there is wisdom. Wisdom is not separate from power. If it be, it becomes useless. In no nation this proposition is required to be made particularly clear. But it is required to be ex-

plained in a particular manner to our people. The reason of this is that there is no swarajya in our country. Some people raise this objection against our party; Why do you not effect social reform? This is said not by us but by those who do not mean to give rights of swarajya to us, but wish to transfer the train of our agitation from one track to another. There are many people who who have effected social reform among themselves. Social reform is thoroughly introduced in Burma. There is one religion. There the people are prepared for anything. Their children marry anyone they like. (But) that country is wholly immersed in a state of dependence. There is no spirit of nationality in respect of anything there. Then, what is wanted? We are one nation. We have a duty to perform in this world. We must get the rights which belong to man by nature, we want freedom. We must have in our hands the right of carrying on our affairs. If you do not get these things, no reform would be fruitful for you. That is the root of all reforms. No power, no wisdom. Mere book learning is useless. If you believe that the people who have come to rule over us are superior to us in intelligence and learning, such is not my own belief. We can show as much learning, as much courage as much ability as they. Perhaps they may not be apparent now but they are in us. There are conjunctions in history as well as in astronomy.

When the Mahomedan rule was declining, the Marathas had only recently risen. Afterwards, the English having set foot in this India, the whole power has passed into their possession, and their power is the cause of the admiration which we feel for them and the pride—be it true or false—which we feel for their ability. And when even a small portion at least of this power comes into your hands, then your wisdom will be of any use. Many things are now wanted by us. Our industries must be improved. But why was it stopped? Who stopped it? If we begin to look out for the cause of this, (it will appear that) we did not stop this industrial reform, we did not stop this economic reform. In that nation, in which there is a way and there is liberty to rise and to show one's ability, good qualities flourish. Where there is utter

slavery and bondage, what qualities will be developed? Nothing will happen except with the pleasure of the master. You will advance only as much as he will allow you. If you possess wisdom, when you assist some great officer and he commends you, then you think that you possess ability. This is a sort of feeble-mindedness—want of spirit—and it has enveloped the whole nation. You say 'I cannot do it.' You never did it, no one gave you a sanad; even before it you make an outcry that you cannot do such and such a thing. Saying so they take to some other path. In my opinion it is a great misfortune that in our Maharashtra at least, some people should bring forward this excuse in the above manner and come in the way of the agitation which is carried on for the acquisition of the rights of swarajya.

Have we not done these things? Think of this. Maharashtra certainly possesses a quality that can be utilized for the nation. But at the present time we do not get an opportunity of making use of that quality. And our mind does not turn to some other thing, such as female education or this or that thing, (simply) because that opportunity is not given to us (cheers). If anyone else sees any danger in this, he may do it, but my mind cannot be convinced, has not been convinced, nor do I think that it will be convinced during the few years that are left (cheers). It is vain to speak of other subjects. At present our people are not endowed with heroism, courage and learning, when our women are educated their generation will become of that sort, but even that is to arise from our own seed (cheers).

If any one has such a belief (as the above) that is wrong. I do not say that female education is not wanted; but when they tell us to turn to it, in order to stop this agitation on this side, then we say this is a remedy to kill the nation. If you do not possess strength, if you have no pluck to acquire anything it is quite foolish to take an educated wife and say that the issue begotten of her would be of the above sort and that those our sons would make some exertions in order to discharge the obligation (under which they would be to us) (cheers). You must stand on your own legs. You must bring about these things. And you must first bring about the

chief of those things. The experience of those who have made exertions for the past fifty years is that this swarajya is the key to all (things). And if this does not come into your hands, then (if you say) 'We shall effect this reform after making exertions (for) minor (reform).' If you mean to effect (it thus) do so, I have no objection (to it). But that will not be helpful to this (swarajya), is not helpful to this course. And I am to speak again to-day on the same subject on which I spoke yesterday in accordance with the same opinion. Yesterday I told (you) what swarajya means. By swarajya it is not meant that the English should be driven away. It does not matter whoever may be the King. We have nothing to do with the King. When we get our rights, that is sufficient. And whoever might be the king over (us), those rights can be obtained.

There is a King in England. But have the English people rights or not? The King of England is himself our Emperor. Hence, if while his kingly position is maintained in England, the English people obtain rights of freedom, then what difficulty is there in our obtaining the rights of British citizenship, the same King continuing to be Emperor in India? No difficulty of any sort remains. This dark imputation which is made, viz., that the agitation about Home Rule—swarajya—is seditious and in the belief of which as sedition a security of Rs. 2,000 was taken from Mrs. Annie Beasant the other day—this imputation, this accusation, does not come from the Emperor, or from the subjects, but from the intervening granary-keepers (cheers). The duty which you have to do is that this administration must be changed. The King need not be changed. Unless the system—the arrangement—according to which the present administration is carried on is changed, every man in India will become more and more effeminate. The duty which we have to perform is that. Such are the institutions of slavery. Some people say, what does it matter if there is slavery? Is it not that (they) at least give to eat? (They) do not (starve) anyone to death.

Even the beasts and birds get to eat. To get to eat is not the aim of man. To feed the family is not the end of man. 'Even a crow lives long and eats offerings.' A crow maintains himself. They

have not to raise crops. They get every day cooked rice to eat. I do not consider it manliness (merely) to maintain oneself (and) fill the belly, to obey the commands of the King after accepting those posts which may be kept open within the limits laid down by him (and) to maintain oneself according to his direction. This nature is common to beasts and men. If there is required the quality of manhood in man, then (it must be seen) whether there is any scope open for our intellect, our ability, our courage and boldness. Such scope is not open for India. Therefore if you have any duty (to perform) then the first duty is take a portion of this authority into your possession. It does not matter if you take a little portion of it; as the President (Mr. N. C. Kelkar, President of the Nagar District Conference) has said briefly, if we do not entertain the hope of being free to act (in matters of) spending our own money, deciding according to our own understanding, according to the consent of five or ten men as to what purpose the tax which we pay is to be applied, then according to the law of nature this kind of hope or thought which is in the minds of men will gradually lessen, and to that extent we shall more and more descend to the level of beasts. Swarajya, swarajya, what does it mean? And what will be the (effect) of it? Does swarajya mean that one Collector is removed and yours has come? If the native Collectors remain and in the end the English Collectors come, we want them. There is no objection to say, remove such and such a man (and) make such and such an arrangement in such and such a place. Perhaps, a white man when paid will be a servant of us too; if he be good we shall also keep him.

The question is not at all about individuals. The question is about the nation. The chief question is whether a certain nation is to be treated like beasts or considering the people in the nation to be men, their sentiment, their desire for liberty is to be bent in some (direction) (and) they are to be brought and placed in the rank of civilized nations. And (if the matter) be considered from such a standpoint, then there is no other way (to accomplish this) than (the acquisition of) swarajya, than the possession of authority. When that authority will

once come into our hands, then we shall be able to do thousands of things. Such a great attempt was made at Poona (to close) a liquor shop at Ghoda—which may be bringing a revenue of a thousand or two to Government. But it is not under our control to close it. Why is so much correspondence (required) to (decide) that a liquor shop should be started at a certain place or should not be started (there)? I think that the annual profit of the shop may not be equal to (the price of) the paper that may have been used in connexion with all this business (laughter, hear, hear). This business which goes on in the present system should be put a stop to, this high-handedness should be ended and the authority should come into our hands. By the authority coming into our hands the hereditary qualities which we possess will be heightened.

We shall find a way to make a use of those qualities in some way or other. That (is) swarajya. Swarajya is nothing else. What if it be to a small extent? It does not trouble you. It does not trouble you as much as it should. (If it be said), one sits at home, does some business or other, gets some money, maintains his children,—this much will suffice, wherefore should there now be the movement for swarajya? The only answer to this is the one idea in respect to the notion, viz. that there is in this world something more than ourselves, that there is one more duty of bringing about the good of a greater number than yourself—this duty you have begun to forget. There was a time when in this country, among the succession (of great men) in the Maharashtra there were able men who were awake to ideals. But owing to fate, this human nature has not remained. If another man begins to do our work, we say, good. When the work is done, that is sufficient. But the discrimination where to say good and where not has left us. The English people carry on our administration, you are sitting quietly. If there be any dirt in the cattle shed they sweep it away, look to sanitation, feed them and water them at the proper time,—but have the cattle put the question that this management should come in their hands? (Laughter) The difference between the men and cattle is that the Collector of Nagar looks to sanitation, tells what

should be done if a disease comes, makes arrangement if a famine comes, takes measures that no calamity may befall you. That is to say, your condition has become like that of a parrot kept in a cage; such a condition is not wanted; the cause of this is not merely that they make things go, but that owing to that arrangement all the (good) qualities possessed by us are gradually disappearing. In order that those (qualities) may not disappear, we must be at liberty to do what they do; other things (lit. subjects) than those done by them are not to be found out; (we) are not to leave (alone) what they do and do any other thing we may like. The same (thing) is wanted. We want the same power to be in our hands. There is only one objection to this. But it is very bad that such a condition should arrive.

A story was published in the Kesari; Rabindranath Tagore has given in his autobiography a poem of this sort about (a parrot) kept in a cage. It narrates in full a conversation between a parrot kept in a cage and a free parrot. The free parrot said to the parrot in the cage. 'There is such fun outside; one can roam so much, go anywhere one likes, can eat at any time one likes. Have you got such joy?' The parrot kept in the cage replied: 'Sir, what you say is true. But where can this golden perch be obtained after going out?' Our condition has become like that. If swarajya be got, how are we to manage it? No one gives, no one takes. Your anxiety is, if swarajya be got how are we to manage it? We are not fit. If the said parrot went out, how was he to get the cage and the perch to sit on, etc? We have reached just the same condition. This condition is not natural. It is artificial. Just as that sentiment arose in that parrot's mind owing to his being confined in a cage for many years, so also the above sentiment arise in our mind owing to the above powers having passed out of our hands. This is not our original natural sentiment—the natural human sentiment. As that is not the parrot's natural sentiment, just so this is not the natural sentiment of our nation. This must be borne in mind at first. We become fit to do the work that falls to us. We are the descendants of those people who were fit in this manner, and if we be their true descendants, their or

the same qualities must become manifest in us when we have that opportunity. And we must make exertions for it with the confidence that they will (become manifest). This is what I say (cheers). If heredity (lit, hereditary effect) has any value, recognize it, otherwise at least give up calling yourselves the grandsons—great-grandsons—of such and such a person. There are now many sardars in our country. They say that their grandfathers were sardars and that they also have inherited the qualities of their grandfathers' blood.

But in order to save the vatan acquired by them (the grandfathers), they serve Sahebs in any manner they choose; well I say, they began (to do) so because they are sardars. But why should you or we, who have nothing to obtain, run after them? A sort of shadow has thus been thrown over the nation, and we have to get out of it. This is an eclipse. When the moon is eclipsed, alms are given for its becoming free. You are not prepared to spend even a pie to put an end to the eclipse which has overtaken you, nor are you prepared to move for it. When the moon was eclipsed, the Brahmans of ancient times used, at least to make jap (repeating passages from Vedas, etc.) Do you make any jap at least? Are you making exertions for this? Are you prepared to pay a few (lit. two) pice to anyone for this? No, nothing. They only raise this objection. If (powers) be given to the Hindus, what are the Muhammadans to do? If the rights of swarajya be given to the Hindus, the Muhammadans would not get (them). As if (we) cannot afterwards duly consult our Muhammadan brethren and come to a settlement. If powers come into our hands we would exercise zulum over the Muhammadans, and if powers pass into their hands they would exercise zulum over the Hindus. These (men) come to tell you these things on the people's behalf. Who are they? Why do they tell you these things? To delude you. This must be considered. These civil servants are far more clever than you. They want to keep power in their hands. This case is like that of (the story) of the three rogues.

When you make a demand in political matters you are told "You are effem-

inate." The Muhammadans are opposed to you. (So will they say.) If the Muhammadans say that they have no objection, (they) point their finger at a third thing. In this manner this roguery is practised. . . . I do not say to any of you that you should do unlawful things in order to acquire these rights. There is a lawful way but that lawful way is such that you must not listen to others at all. You must be prepared to say resolutely that you want what is yours. So long as you do do not make a resolution in your mind, as soon as some police officer comes (and asks you): "Well, had you gone to Mr. Tilak's lecture?" (You answer) "Yes, I went towards the end (of it), sat at a distance, and could not hear the whole." (You) cannot deny, as the police officer has seen (you). Why is there such a fear in your mind? What is there to fear in saying that you want swarajya? It is here that the difficulty arises. When subsequently asked by the people who had attended the lecture, he tells the truth. But if asked by the police he says: "I did not hear it well, two or four people were telling, what could be done? Well my opinion is not like his." Such shuffling will not do in this matter. No goddess is propitiated by shuffling. That goddess knows what is in your mind, and of all these knowing goddesses, the goddess of liberty is most particular on this point (lit. subject.) Ask what you want and they will give it. Perhaps they may say no once or twice. How many times will they say "no"? They must be convinced that there is no shuffling in this matter. They must be convinced that there is no other course, unless effort is made. It is the business of every goddess to frighten you until it appears that there is something in you. If we look into our yoga science, (it appears that) a goddess has to be won over. They begin to frighten (us). If there is success, all right.

If without yielding to fear, we do our work resolutely, the goddesses of the yoga science will become propitiated. This admits of proof, this is the rule. Even in political matters there is no other rule--no other way. We want it, we shall secure it (swarajya), and we shall not give up our exertions without getting it,—unless there be such a firm

confidence in you this thing would not be obtained at all. This fear will remain behind, the police will remain behind, the C. I. D. Collector will remain behind, in the end that thing will be obtained. You must not be afraid of their blustering and bawling. Nay, (you) must consider that this is a definite consequence of this. There is a saying in English. "How can light be seen without going through darkness?" To rise in the morning, the sun has to go through darkness. I tell you, the belief of the common people, and not a proposition (lit. belief) of science. 'Without going through darkness, light cannot be obtained. Without getting out of the reach of these blasts of hot air, troubles, and people's blustering and bawling, liberty cannot be obtained. Resolution is wanted. I told you what is swarajya. Efforts for it must be begun as much strenuously By the grace of God the world's condition is at present undergoing a change. To speak in the language of faith, God has become ready to render help. But though God be ready, you are not ready (laughter). God is quiet. Should a gift be sent to you from heaven! Nobody at all sends. Even God does not send. And if He sends, it will also be of no use. For when you are afraid, what already exists may afterwards disappear. If this gift is given, how is it to be used? That is to say, if there be any place of God, you will send it to his house. You will send it if it can be sent by post (laughter). After there is (rise of) such a sentiment, after authority of this sort which forms part of the national rights of which I have told you comes into your hands, what will take place? What will be the effect upon the nation? This I am going to tell to-day. I have told you what is swarajya. My friend, Mr. Kelkar, has already told you that swarajya does not mean that our authority is to be established here by driving away the English. Some people will have to be driven away. (Swarajya) is not driving away the King and taking his authority into one's hands. It means taking into the hand the subjects' rights. If it be carefully considered, if England derived any benefit by keeping this one nation a slave, it will be seen from the condition of the whole of the world to-day that England will have some day or other to

give liberty to the provinces and countries forming parts of the Empire under its control. This thing is to take place some day. It must take place. But if you do not do anything then only it will not take place. After keeping awake the whole night, you fell asleep when the thief came, such will be your condition. The time is coming. Perhaps the nature of the change occurring in the world—in other nations—will by the grace of God prove favourable to you.

But (if) the time be favourable, it will be of use if you are awake. Otherwise (once) you sleep, you will sleep on. Owing to this, what will it avail even if we get the rights of swarajya? I will briefly give you a picture of what will happen. What happened during the Peishwas' time? We must examine history a little for it. At the time of the Peishwas the administration of Maharashtra was going on well. Elphinstone was the Saheb who brought about the fall of this rule of the Peishwas, and who became the Commissioner after its fall. That Saheb is witness (to what I say). Though the city of Poona was such a big one, there took place no dacoities (in it) at night. The consumption of liquor was nil. It was altogether prohibited. The original system of jama-bandi which was once settled by Nana Farnavis, was itself copied afterwards. Nay, the science as to how accounts are to be kept took its rise among us under the Peishwas' rule and those very accounts are now kept. We know how to administer provinces. The C. I. D. of Nana Farnavis was so very excellent that information as to what a certain sardar spoke to a certain man at the time of dining used to be sent to him (cheers). The following incident is said to have happened at one time. The Bombay Government had sent ammunition to the Resident in a palanquin by way of the Khopoli Ghat. An order was issued from the Poona Daftar that the palanquin which might come on such and such a date should be stopped on the Ghat. It had the information that ammunition was to come in a palanquin. Afterwards the Resident complained: "Why is our palanquin stopped?" Thereupon he received a reply from Nana Farnavis:

"You yourself think about it. We have attached the palanquin and will not let it go. The

King must needs be informed what has taken place and at what place. We have done it."

(So he was) told. The C. I. D. is wanted. Who says no? If the King has no information (he) will not be able to carry on the administration. We have no complain against the C. I. D. (Our) complaint is about its method of working (cheers) (hear). That method is not under our control. He who has to carry on the administration, must have all departments. Police is wanted. C. I. D. is wanted. Revenue (Department) is wanted. Judicial (Department) is wanted. All departments are wanted. Where (then) is the difficulty? There is difficulty in one matter. All (the department) must be under the control of the people—our control. The difficulty lies only in this. Several people have formed the opinion that the English are the most civilized, we too must civilize ourselves, who does not want civilization? All reforms are wanted. During Nana Farnavis' time letters had to be sent; now the C. I. D. will send a wire. Means have become available. The administration is to be carried on by making use of all these. But the whole of this system of administration existed at the time of the Peishwas' rule. Consider what has taken place now after the break-up of that system. When the Peishwas' rule passed away, Nagar, Satara, Poona, which were in the possession of the Peishwa himself, came into the possession of the English. The lieutenants of the Peishwa at that time were great generals. Gaekwar (lit. Baroda), Holkar and Scindia were the chief among the jahagirdars and sardars who commanded the army. These three survived, as all of them soon joined the English Government and the Peishwas' rule was overthrown. This is the history of 1818. What is the condition of these three to-day? What is the condition of the Baroda Sarkar? What is the condition of Holkar? What is the condition of the Scindia Sarkar? And what is the condition of the territory of the district (s) adjoining Poona? Think about this. These three or four districts having gone into the possession of the English Government, the whole of their administration gradually passed into the hands of a bureaucracy. The policy of this bureaucracy is not to listen at all to the people. First Gover-

nor, then Commissioner, then Collector, the Collector's subordinate, the Assistant Collector, Mamlatdar, Aval Karkun, Fouzdar, Police sepoy—such is the arrangement of the whole of the bureaucracy from first to last. What is to be done for the people is to be done by them. The Government above issues orders in respect of anything which it may think beneficial or harmful to the people, and according to it steps are taken below. At first (this arrangement) was thought very good. The disorder under Bajirao's (rule) was put an end to. They said they were safe now. They saw the ghee but not the rod (laughter). It began to be seen gradually afterwards. All authority went under the control of this bureaucracy. And the remaining people got education. (They) began to make use of railways. A telegram can be sent if (some one) is to be informed whether I am coming to Nagar or not. Education was received. All these benefits were got. But all this authority went into the hands of the bureaucracy. It had passed (into their hands) to some extent at the time of the company. And (it passed wholly into their hands by) the Government of India Act passed in 1858. It is 58 years now since that Act was passed. What has happened during these 58 years? The officials became powerful, and possessed of authority. The people's authority became less. To such an extent that (it was said) we do not want the Kulkarni, we want all servants. Whatever hereditary rights (lit. powers) we may have possessed they too have gone. (This) did not strike (us) when the Inam Commission was appointed. That cannot be helped. They said Vinchurkar was a jahagirdar at that time. He was the master of the army. Some one was an officer of an army of 10,000, while some other was the officer of an army of 15,000. They were told: 'You have to supply an army of 15,000, while you have to be paid 15 lacs of rupees of which you have to spend 14 lacs. Then, take one lac of rupees.' They consented. (The amount) can be enjoyed while sitting at home, then what? This is a great principle. Nobody said at that time: 'We lost our right (lit. authority) to keep an army, to fight for Government;' nobody thought so. (It was thought that) Government was good (as) it gives to eat while we sit at home.

What more is required? We have been reduced to such a condition owing to this state of things. In 50 or 60 years all the powers of this province have passed into the possession of the European bureaucracy. You should not understand from this that I call the European bureaucracy bad. They are very much learned. These posts are given to the best students from England. Their abilities are greater. But even if all this be admitted, still (it is a fact that) they have to undergo great wear and tear while working for us and the climate of England being cold and that of this country hot, larger pay has to be given to them. Having come for our good, will you say 'no' to them? (laughter). All things are admitted by us. I do not also deny that they may perhaps be working a little more than we. I only say, when we are ready to do the work, when it is our work, why (give it) to others? Nor do (I) say that they do it badly. Our minds have begun to grow weak owing to restriction being placed on our work (and) against our interest. Our enthusiasm has begun to become less. Effeminacy is increasing. Therefore we do not want this. I do not say that they are not wanted because they are not educated. They are good. They are merchants. Will you not get for your shop some agent more clever than yourself? They may be (such men). But will you give your shop into the hands of such an (lit. that) agent and stand aside, taking such money as he will give? This is indeed a question in business. It is a question in any matter.

Such was the management of this Province. What became of Baroda? Look at the history of Baroda. There are such writings in the history of Baroda. And what he could do there by degrees was not done here by degrees. The gadi of the Maharaja of Baroda had to be perpetuated. That was (lit. is) a matter of regular succession. That is a part of history. Formerly Baroda used to be managed or supervised from Poona and the rest was done by the Kings of Baroda. It might have been done by other kings. Therefore if you become ready now by receiving education here (you) go to Baroda and ask for service there. There are men educated in Poona and Bombay, who are District Magis-

trates, Munsifs, Subhas and Diwans there.

There are Naib Diwans (and) High Court Judges. These people are working there. They work (there) without complaint (being heard about them). Then where is the objection to the same being done here? If men from the Districts of Poona and Satara go and conduct the administration of Baroda, what objection is there for them to carry on the very same administration in the same way in this our Province? Who has taken objection? The nation being divided into two parts, one part—the Marathi nation—went into the possession of the English on account of some historical reason, and one remained in the possession of (native) Chiefs. One part says that the people of this nation are fit to do work. In the other part the authorities say that they are unfit, and we too, saying ditto to them, begin to talk like them. There are two standards, two sides. Then what is wanted when (one talks of) swarajya? Now you will see where is the objection to make the very same arrangement with regard to Poona (and) Satara as exists in Baroda? The authority of the English Government will remain. It is also over Baroda. The Chief of Baroda is not an independent king. When the Peishwas' rule existed in Poona the treaty of Bassein was made (in the proportion of) 10 to 6 annas in the rupee. Had the state of Poona remained, they too would have been able to manage it. Satara and Nagar could have been managed by them. The same management exists in the Nizam's territory. Swarajya means this much: Give those rights which Native States have and which the Baroda and Scindia Sarkars have, to Poona and Satara after forming them into a State of the Central Division. One difference must however be made in this. Now a hereditary chief will not do for us.

We shall have to elect our own President. This (is) the only difference. It is an historical puzzle or inconsistency, that the Province which was the capital of the Marathas should not be given the arrangement which exists in Native States, while those Provinces which were dependent on that Province should have it. There is no reason for this. Why should we not become like them? I have told you that the Gaek-

war and Scindia have sent money and armies to Europe for the war. If (these districts) had been in our possession, we too would have done the same. This thing has nothing to do with (the question whether) the British Government will go or remain. But the only difference lies in the continuance or the disappearance of the authority of the bureaucracy, the foreign bureaucracy. This is the difference between the arrangements. There is no difference as to the sovereign authority, which is at the root. I think Mr. Lawrence had formerly suggested that (in view of) the swarajya agitation going on India should be divided into separate Native States, that some experts should be kept there and only the powers with regard to making treaties with foreign powers and the management of the army and the navy should be kept in their (lit. our) hands so that the English rule may not be in danger. (I) do not say that you should not retain these powers. In the arrangement of swarajya these will be the higher questions of Imperial politics. England should freely retain in her hands the questions as to what kind of relations should subsist between India and other nations, whether war should be made for a certain thing or not, and what policy should be followed when relations with foreign nations arise. Those who want swarajya do not wish to interfere with these things. What we want is that just as we are today managing our own (things) in Native States, we want authority to do the same with regard to ourselves. We shall expend on such and such items the revenue which we get from taxes, we shall spend it on education, if there is less revenue from liquor we shall decide what other taxes should be imposed in lieu thereof and arrange accordingly, we shall manage trade, we shall manage all affairs, you should not interfere in them.

The people of India do not go to any other nation. Why do they not? See if you want to, whether they join France or Germany. If there be still a doubt, one must be able to understand from the present state of things that if Indians are prepared to have connexion with any particular country that nation is England (cheers). We will not be benefited by England going away and Germany coming in her place. We do not

want the thing. Even if the matter be viewed from another practical point of view, England is here for 100 years, (while) Germany will be a newcomer, and its energy will be fresh and hunger unsatisfied. How will that do? What is, is all right. A new king is not wanted. But give into our possession a portion of the powers by losing which our condition is being reduced to that of orphans. It is not I alone that am saying this. Mr. Lawrence had said so. (He writes that) if hereafter improvement is to be effected in India after war, if Government intends to effect some (new) arrangement with regard to the people (lit. them), then divide India into different parts. The question of language did not enter his head, but we shall add that idea. Form one separate State each of Marathi, Telugu and Kanarese Provinces. The question of vernaculars also comes in this (question of) swarajya. There is no question which is not dependent upon swarajya. Had there been general liberty, there would have been a Gujarati University, a Marathi University, an Agricultural University. But to do that does not lie in our hands.

Is the question whether education should be given through vernacular such a big one, that there should arise differences with regard to it? But (our wish) does not prevail here. Do the English educate their people through the French language? Do Germans (do it) through the English language? Do the Turks impart (education) through the French language. So many examples being before our eyes, why should we write articles, columns upon columns long, upon the subject? Why does that which these people say, not take place now? Because (we) have no authority. You have not got the authority to determine what should be taught to your (lit. our) children. So many of you send (your) children to school, but do not consider what will become of them. In short there is no question at present which is not dependent on swarajya, on authority. Ranade and others have (up till) now made efforts with regard to the Fergusson College and the University. But who is to be prevailed upon? Government! They know what arrangement there was in their country. Why should the same not be here? (For) imparting English education to all, the

English language has to be taught for seven or eight years. Eight years is not a small (part) of life. Such (a state of things) exists nowhere (else). This arrangement does not exist in any civilized country. If inspite of this your attention is not drawn towards swarajya, then be sure that there is something wrong with you eyes (cheers). Whatever you have to say, whatever prayer you have to make to Government, let that prayer be for giving authority, and not for anything else. We want those things which are the leading ones under this rule. I have already told you that wherever we go (our path) is ultimately obstructed,

The question of education is an ordinary one. There must be schools in each village. Whence is the money to be brought by us? (We) pay taxes to Government. Do we pay them for nothing? Let us have the system prevalent in England for imparting education. There is money in the treasury; it is utilized, it is paid for other purposes; but it is not expended on those things which are necessary for us. Therefore what I have told you lastly... India is a big country. Divide it if you want according to languages. Separate the Marathi (speaking) part and the Gujarati (speaking) part. But how are the Hindus and the Englishmen to be taught in them? I am going to speak about this also. In Canada the population consists of Frenchmen and Englishmen. If English statesmen could settle (the question) there, would they not be able to settle how Hindus and Mahomedans should conduct themselves (here)? Thus these are excuses for not giving us these things. This you must believe firmly. If India be divided into different States in this manner. The Province of Bengal is separate. Instead of appointing over it a Chief from this side, I say, a European Governor may be appointed for some years. What used to happen before a President elected by the people was secured?

A Governor used to go from England to Australia. He was obliged to work in the council as he was told. Here, it is contrary (to the above). If you want any thing, a resolution is to be brought before the council, much preparation is to be made, figures are to be collected, he does not get even a pice. The other members of the council are paid. He

has to work for nothing, and at last the resolution is rejected. Though it be passed, Government cannot be forced to give effect to it. It is a childish thing. (I think that he) who does not think it so possesses proportionately less patriotism (cheers). This is like setting (us) to fight by throwing grain of boiled rice, without giving anything to us, without giving any power to us (lit. without our possessing any power). If any rights will be obtained from this in future, if any power will come into our hands, if (this) be given to us as a step towards the above, then it has a value, otherwise it has no value. What does happen? This is the science of setting good and well-educated men to fight for two or four ghatkas. Hence, bear in mind what will result from swarajya and what we ask. In (asking for) swarajya we ask that in the end there should be such States throughout India, that at first Englishmen coming from England and at last Presidents elected by the people should be appointed in these States, and that a separate council should be formed for (disposing of) questions relating to the whole nation. Just as there is an arrangement in Europe, America and the United States and just as there are different small States and there is a Congress to unite them together, so the Government of India should keep in their hands similar powers of the Imperial Council. There are at present seven or eight different Provinces; make them twenty if you like, and make such an arrangement in respect of those Provinces as will give facilities to the people, meet with their approval and place power in their hands. This itself is what is meant by the demand for swarajya. The demand for swarajya does not mean that the Emperor should be removed. Perhaps, for this arrangement you may have to bring English officers in some places. This is admitted. But those officers will be ours, will be of the people, will remain as servants of the people, will not remain as our masters. The intelligence of our people will not alone suffice to bring about the reforms which are to be effected in India.

We shall have to bring men from England or America, but those men will be responsible to us. They will not be irresponsible. Hence, from one point

of view, it cannot be said at all that this agitation is against Europeans. To whom would they be responsible? To themselves or to us? So long as this responsibility has not come to us, (so long as) their responsibility has not come under our power, it will continue to be just so? Till then, our efforts will be vain, though made in any direction; till then, in whatever other matter we may make any movement, it will be ineffectual, and the desired object will not be accomplished. As long as a nation is not free to bring about its own good, as long as a nation has no power to make an arrangement to bring about a certain thing which it may desire, so long I do not think your belly will be filled if you are fed by others. Now the people know, some people are convinced, that the people's good cannot be effected by what is called 'despotic rule' in English. Hence, my object is to tell you that you should make efforts. If my words fall short of (expressing) it, that is my defect, not a defect in the idea, which is faultless. All these things, their different natures, cannot be placed before you in a single lecture. As regards this idea of States about which I spoke, there are many questions, viz., what arrangements should there be in them? What rights should there be in them? And what amendment should be made in the India Act of 1858 about consolidation? And though I may deliver not only one but four or ten lectures, they would not be sufficient (to deal with those questions). Our principle is one—about this alone I have to speak in (this) lecture. Those of you who are competent, by virtue of intelligence, wealth or in some other manner, to consider these things, will spontaneously know that these things are wanted. Why ask, 'will this be obtained? Will this be obtained? To acquire it or not lies in their hands. I do not understand this question at all. You are making so much exertion. (No matter) if it be not obtained.

As for making exertions, it is in our hands. We need not consider whether we shall get it or not. Exert yourself. The work which you do will not fail to produce some result or other. Have firm belief in your mind. Have not any men obtained any freedom in the kingdom or not? Had goddesses fallen from above in other nations? I tell you

plainly that if you have no courage, (it) will not be obtained. If there be courage, if it be not obtained to-day, it will be obtained to-morrow. It will be obtained after 10 or 20 years. But you must make efforts for it. The principle of your religion is this. "You are only to work, you are not ever to look to the fruits." Why is this said in the Gita? Is it for going to worship, for obtaining a seer of rice by reciting Puran? Great religions tell this very thing. The Western history tells this very thing. In spite of this, will you ask, "What will become of us? How shall we, fare?" "As made of a ball of earth, etc." There is a ball of earth. We have it to be called Vishnu. We have it to be called Shiva. And we impart so much importance to it that it is worshipped by the people. Lo, (it is) merely a ball of earth without any movement. When dropped on the ground it falls down with a thud. We can give a form to that ball by some act, exertion (and) ceremony if a form of some sort cannot be given to an earthen ball, it must be said to be your fault. It is possible to give them a form. Do not make haste. Nothing will be gained by it (haste). If you work resolutely, a different form can be given to an earthen ball. This thing is told in the Shastras. It is proved. It is proved by experience, proved by evidence, by history. If, in spite of this testimony placed before you, you are not convinced, if you are not satisfied, at least give up talking about the country attaining a flourishing condition afresh. Do not bother our heads. These things are capable of happening—must happen. There must be such faith. That faith brings about works. Where that faith does not exist? What is to be done then? They do not give anything, they only say they would give—such an opinion is not wanted.

I do not say that what may be given should not be taken. Take what is given, ask for more, do not give up your demand. (Laughter). We want so many rupees. You gave one hundred. "Take one hundred from another"—why should you have such an opinion? If even (some) out of hundred be not offered, what have you now to say against them? (Laughter). We want one thousand. When we get a thousand rupees, we shall be satisfied. If 1/10 of a hundred be

given we shall thank (you) (laughter). Not that we shall not thank (you). This is human nature. If my paper falls down, I shall say "thank you" when you give it to me. This is human feeling. I do not tell (you) to give it up. But the humanness of man lies in securing those aspirations which are included in this feeling. All these other feelings must be treated as servants of that feeling, that exertion, that one goal. When this is done swarajya will be obtained. Swarajya is not a fruit (so) that it may at once fall into the mouth from the sky. Another man is required to put it into the mouth. This is such a work. And for it this beginning is made. The paper which my friend Tatyasaheb has now given into my hand is of such a sort. The work has been begun a little in India. Mrs. Annie Besant has established a Home Rule League at Madras. Here also we have established one. And in the same manner a Home Rule League will soon be established in Bengal or elsewhere. If, perhaps, the Congress will take up this question and itself establish a league, the other leagues will be merged into it. The same work is to be done. This work is one and you are to do (it). This is a question of (securing) benefit. We have to obtain swarajya. I have told you what sort of swarajya is to be obtained. I told you what change it will hereafter produce in the present condition.

The House of Lords have begun to have such dreams. Lord Hardinge said that the Civilian will soon have to place in your hands the rights belonging to you. The people belonging to the party opposed to you in this matter have begun to have bad dreams (laughter). While you alone (say), 'We are unfit, we shall not take this.' Whence (does) this obstinacy (arise)? (Laughter.) What is the rationale of this? (It is that) they have begun to have such dreams. They think that some or other arrangement of this sort will have to be made.

The work you have to do first (is this): You must make agitation in the whole country and convince every man that this alone is our goal. For this we have to work. Nay, we must settle what is it we want, what arrangement should there be—this demand must be settled. We must go to England and convince the people of it. And when this subject

will be discussed in Parliament this subject must be placed before it in a proper manner. That 'proper manner' means that a bill to amend the existing India Act must be brought before Parliament. What we have to demand is this: Amend this Act for us. When the East India Company was abolished and the rule of the Queen's Government came, this Act was amended, i.e., minor amendments were made in it. We want to have it amended in a certain manner. And this is wanted not merely for our good, but for the good of the Empire. To make such a demand of them is a part (lit. business) of that work. This work must be done with the help and acquiescence of all. There must be left no difference of opinion about this. The moderates and the Nationalists have one and the same goal, one and the same demand is to be made and one and the same (thing) is to be obtained. For doing this work which is to be carried on by entertaining this sentiment, a separate institution called the Home Rule League is established.

This subject is placed before the Congress. But as the Congress is to assemble once a year, when once an opportunity is gone, (another comes) in the next year. But we have to do this work throughout the year. This is admitted by the Congress. With this object we have established this league. Not very great exertion is required for this. Recognize this goal. We have a right to demand (the fulfilment of) this goal. The demand for money made to-day is only this: Every man should pay one rupee. The admission fee is Rs. 2. But if this is not to be paid, pay at least one rupee. If one lakh out of thirty crores of people be not found (willing to pay), then at least cease to prate about India. Do not tire our ears. I do not think that more than a year will be required for this agitation to become successful. The subscription for one year is fixed at Re. 1. It is not necessary to carry on the agitation for 10 or 20 years. Such a time has come. Hence if you are not disposed to make the self-sacrifice of taking one rupee out of your pocket for this agitation then at least do not come to the lecture, so that it may not be necessary to talk so loudly. If you have to do anything it is only this.

The people belonging to this institution are prepared to make the remaining arrangement. For this purpose many lectures like this will have to be delivered in various places. People will have to be got together. (The matter) will have to be explained to the people. If the police come to stop (the proceedings), if it is not (allowed) here, we must go elsewhere and assemble. We must go there before the police go. We must persist. Do not think that this can be obtained easily and pleasantly. One rupee is nothing. There must be resolution of the mind. If anyone comes to ask, you must plainly tell him: The goal we demand is lawful. We have become its members and paid one rupee. We want that thing. You must say this fearlessly. If you have not the courage to say this, that is a different thing.

I trust that this thing will be considered good by the whole of India, perhaps by your descendants if not by you. Though you may not have the will, this thing must be done. If not you, the people of the next generation will make efforts, but they will call you asses. If you mean to put up with this, then I have no objection. My own conviction is that it will be obtained. Bear in mind what work you have to do, and what help you have to give. Perhaps there will be trouble from the police, this is not denied. (If they ask), 'Well, have you become subscribers? Have you become members?' You must say: 'Yes, we have become.' Such is the law, nothing else will happen. If a prosecution be instituted, the pleaders in this (institution) will conduct the (defence) without taking any fee (laughter). If a rupee be paid for this work, that would not be sedition. More than this (i.e., paying Re. 1 and becoming a member) you have not to do. This league undertakes to do the remaining work. (Strange) that the people of Maharashtra should remain quiet at such a time! We want all, whether they be Muhammadans, Hindus (or) Marwaris.

Among these there are none who are not wanted; in this there is no distinction of caste or religion. This work is to be done for India. I have already stated on a former occasion at a certain place, that there is a (practice) amongst you traders that they keep one anna (in the rupee) out of profits for cow-protec-

tion. Such is your habit. I ask, 'Why should not the traders give to us a pice or $\frac{1}{2}$ pice in the anna for this (object) also?' India is a great cow, not a small one. That cow has given you birth. You are maintaining yourselves on that cow's industry, on her fruitfulness, (and by) drinking her milk. (You) forget that cow, but (lit. and) on seeing the accounts, one anna, one anna (is seen) debited in (her) name (for cow protection). For what is (the anna) taken out? For giving fodder to the cow, for rescuing her from the hands of the butcher. We are dying here to-day without work. But does the idea ever occur (to you) that this is a cow for you? That idea never occurs (to you). This is a work for the protection of religion, (and) for the protection of cows.

This is the work of the nation (and) of political progress. This (work) is of religion, of progress. (I ask you) to take into consideration all this and to assist us as much as lies in your power. I have already said we do not ask for more than one rupee per man. He who has the ability should obtain the merit of protecting the cow by paying this one rupee at least once to this institution. This is a great work. If sons of the cow will not care (about) this then you shall have to be called bullocks, as the sons of cows are called (laughter). You shall have to be given that name which is commonly applied to cow's sons. I have told you these things. This institution has been started. Work has commenced. If perils overtake it we are prepared to bear them. They must be borne. It will not do at all to sit idle. All will be able to support themselves. Therefore assist in this manner this undertaking. Then God will not abandon you: such is my conviction.

These things will be achieved by the grace of God. But we must work. There is a very old principle that God helps them who help themselves. This principle occurs in the Rigveda. God becomes incarnate. When? When you take complaints to him and pray to him. God does not become incarnate for nothing. God does not become incarnate for idle people. He becomes incarnate for industrious people. Therefore begin work. This is not the occasion to tell all the people to-day what sort of amendment is to be effected in the law. It is diffi-

cult to discuss every such thing at such a large meeting. Hence put together the few general things which I told you (now) and those which I told yesterday and set about to work. And at last having prayed to God to make your efforts successful I conclude my speech (cheers).

Batchelor, J.—This is an application by Mr. Bal Gangadhar Tilak, praying this Court to revise an order made by the District Magistrate of Poona under S. 108 and the following sections of the Criminal Procedure Code. The order complained of directs that the applicant do enter into a bond in a sum of Rs. 20,000 with two sureties each in a sum of Rs. 10,000 to be of good behaviour for a period of one year. The ground of the order was that in the learned District Magistrate's opinion the applicant disseminated seditious matter in the three speeches which are now upon the record.

These speeches were admittedly made by Mr. Tilak. They were made in the Marathi language, but the translations before us are, it is admitted, substantially correct, and in my view nothing turns upon certain small niceties of expression in which the defence suggest that the official translation contains slightly harsher words than the Marathi warrants. Thus the only question is, whether in the three speeches the applicant is proved to have excited, or to have attempted to excite, disaffection towards the Government established by law in British India within the meaning of S. 124-A, I. P. C. In my opinion the application does not give rise to any real question of law. But I must notice a mistake of law into which the learned Magistrate has inadvertently fallen. Following Strachey, J.'s original pronouncement to the jury in *Queen-Empress v. Bal Gangadhar Tilak* (1), he has held that 'disaffection' is the equivalent merely of 'absence of affection.' I cannot say whether this expression did or did not influence the learned Magistrate's decision, but it is plain that it may have done so. It is, I think, equally plain that this construction of the word 'disaffection' is opposed to all ordinary English usage in words compounded with the particle 'dis.' Dislike, for instance, is not a mere absence of liking,

1. (1898) 22 Bom 112.

nor is disgust for a thing a mere absence of taste for it. This, indeed, was recognized by the Full Bench which amended Strachey, J.'s definition; see *Queen-Empress v. Bal Gangadhar Tilak* (1). The present Explanation No. 1 appended to S. 124-A now sets the point at rest. With these definitions before us I say that there is not in my opinion any real doubt about the law governing the case.

Next there were on behalf of the defence two preliminary arguments on which a word must be said. It will only be a word, because in my judgment the points taken are wholly devoid of substance or merit.

First, then, it was said that there could be no excitement or disaffection in these speeches, inasmuch as the speaker openly and sincerely professed his loyalty to His Majesty the King-Emperor and the British Parliament. To that I have only to say that, as I read S. 124-A, it is clear that to a charge of exciting disaffection towards the Government established by law in British India a profession, however sincere, of loyalty to His Majesty and the British Parliament is no answer whatever.

Secondly, it was contended that the speeches could not in law offend against S. 124 A, because the speaker's attack was made not on the Government nomination but on the Civil Service only. That, I think, is not quite so in fact. But assuming it to be so, it affords no answer to the charge. For the Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace. Therefore where, as here, you criticise the Civil Service en bloc, the question whether you excite disaffection against the Government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the Civil Service, is also to infuse hatred or contempt of the established Government whose accredited agent the Civil Service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government. It is, I think, a mere question of fact.

Passing now to the speeches themselves they must be read as a whole. A

fair construction must be put upon them, straining nothing either for the Crown or for the applicant, and paying more attention to the whole general effect than to any isolated words or passages. The question is whether upon such fair construction these speeches offend under S. 124-A or not. Now, first, as to the general aim of the speaker it is, I think, reasonably clear that in contending for what he describes as swarajya his object is to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people or peoples of India. I am of opinion that the advocacy of such an object is not per se an infringement of the law, nor has the learned Advocate-General contended otherwise.

I wish to be understood as confining these last observations to the case which we have before us and to the object which, as I have explained, these speeches seem to me to pursue. I desire to guard myself from being supposed to say that the advocacy of swarajya is in all cases permissible. That is a point upon which it is not necessary now to pronounce an opinion and upon which I refrain from pronouncing an opinion. For, as I understand it, the word swarajya may have a dozen different meanings in the mouths of as many speakers. The remarks which I have made are applicable only to the object aimed at in these speeches, as I have already defined that object.

We must now turn to the actual language employed by the applicant, noting especially the methods which the speaker advocates for ensuring the political changes which he seeks. First, it is a matter for observation that he formally and expressly repudiates all intention of sedition. That of course is by no means conclusive. But it is a fact to be considered along with other facts. For I am bound to say that a candid reading of the whole speeches does not convince me that the repudiation of disloyalty is feigned or artificial. Now the intention to create disaffection must of course be proved, and following the usual rule that a man must be taken to intend the natural and probable consequences of his own acts, we must seek for the speaker's intention in the language which he has used.

In the course of the argument com-

ments were made, and quite properly made on the form of many expressions to be found in the addresses, this form being in many cases offensive or insulting in the personal sense. These matters however though they may convict the speaker of bad taste or bad temper, do not seem to me to go very far towards convicting him of a violation of the criminal law.

Now it not being contended that the main object of the speaker's advocacy is in itself forbidden, we must see whether there is anything in the language used or the methods urged which fairly brings the applicant within the penal section. The answer must of course depend on the effect likely to be produced by the speeches on the minds of the hearers. Would that effect naturally and probably be to excite disaffection, as defined in the section, or to excite only such measure of disapprobation as is not forbidden by the law? The arguments which we have heard to assist us in answering this question are no doubt helpful. But it must be borne in mind that all such arguments necessarily concentrate upon certain selected passages, whereas the Court's aim is to decide upon the general effect of the speeches as a whole. Probably the fairest way to ascertain that effect is to read the three speeches from beginning to end quietly and attentively, remembering the arguments and remembering the politically ignorant audience whom Mr. Tilak was addressing. I have so read these speeches not once, but several times, and the impression left on my mind is that on the whole, despite certain passages which are rightly objected to by the prosecution, the general effect would not naturally and probably be to cause disaffection, i. e. hostility, or enmity or contempt, but rather to create a feeling of disapprobation of the Government, for that it delays the transference of political power to the hands of those whom the speaker designates as 'the people.' For this conclusion I can only appeal to the general purport of all the three speeches as a whole. They cover 34 pages of print, and of course I cannot set them out in extenso in this judgment. I must therefore perforce refer to particular passages of particular consequence. But I wish it to be understood that my decision is based not

on particular passages, but upon the general effect.

I proceed now to cite a few passages in order to show what in the speaker's own language is the meaning of that swarajya which he was advocating to his audience. He tells them:

"But however good may be the arrangement made by other people, still it is not the case that he who wants to have the power to make this arrangement always approves of it. This is the principle of swarajya. If you got the powers to select your Collector, it cannot be said with certainty that he would do any more work than the present Collector. Perhaps he may not do. He may even do it badly. I admit this. . . To put it briefly, the demand that management of our affairs should be in our hands is the demand for swarajya If you carry on such an effort now for 5 or 25 years, you will never fail to obtain its fruit."

This passage is important, as showing that the speaker does not expect that the political change which he advocates is to come suddenly or by a stroke of the pen. In other passages he uses the following language:

"Confer those powers upon the people so that they may duly look to their domestic affairs. We ask for swarajya of this kind. This swarajya does not mean that the English Government should be removed, the Emperor's rule should be removed and the rule of some one of our Native States should be established in its place. . . . But we must do those things which relate to business, trade, religion and society. Unless the power of doing those things comes partially into our hands in the end it must come fully—unless it comes fully into our hands, it is impossible for us to see a time of plenty, the dawn of good fortune, the advantage of prosperity. Water cannot be drunk with others' mouths. We ourselves have to drink it. . . . The first duty is, take a portion of this authority into your possession, it does not matter if you take a little portion of it. . . . New King is not wanted. But give into our possession a portion of the powers by losing which our condition is being reduced to that of 'orphans.' "

The above passages show the nature of the demand made. With this demand as a political theme I have of course no concern whatever, and I decline to say a word upon the subject. My concern is to say only that, as a judge, I find nothing in it that offends against the law. Passing now to an inquiry as to the methods advocated for securing the result proposed, I set out the following excerpts as indicating the speaker's general views:

"It is an undisputed fact that we should secure our own good under the rule of the English people themselves, under the supervision of the English nation, with the help of the English nation, through their sympathy, through their

anxious care and through those high sentiments which they possess In this manner good management is to be asked for in this administration. Amendment is to be brought about in the present law; it is to be brought about through Parliament. We will not ask for it from others. We have not to get this demand complied with by petitioning France. The Allies may be there, we have not to petition them. The petition is to be made to the English people, to the English Parliament Owing to the war which is now going on in Europe, it has begun to be thought that unless all the many parts of the British Empire unite together that Empire would not attain as much strength as it should. It has so happened now that a consciousness has been awakened in them that they stand in need of aid from other countries, called Colonies, belonging to them, Australia, Canada and New Zealand which are inhabited by Sahebs. If you take advantage of this awakened consciousness, you too have this opportunity of acquiring some rights. No one tells you to obtain these rights by the use of the sword. But to-day the nation's mind has undergone a change. India can give some help to England. If India be happy, England too will acquire a sort of glory, a sort of strength and a sort of greatness. This consciousness has been awakened in England On the day on which you will be ready to do this, particularly in these days after the war is over, the administration shall have to be changed in some respects at least I do not say to any of you that you should do unlawful things in order to acquire these rights. There is a lawful way."

In all these passages which I have cited as fairly typical of the speeches, as fairly exemplifying the speaker's general drift, not only is there nothing illegal, but there is a distinct pleading that the political changes advocated should be obtained by lawful and constitutional means. I need not lengthen this judgment by reference to the large mass of arguments used. It is enough to say that, in my opinion, the bulk of these arguments is free from legal objection and I notice as among such arguments the contentions that Indian administrators govern Native States without complaint; that in British India British officials are paid too highly, and Indians, though they are free to discuss, have no effective control over finance or policy; that the present officials being in fact alien by race, though able and industrious men, do not readily understand the needs of the people. Now all this may be politically wise or politically foolish. With that, I say again, I have no concern. But it is in my judgment fair political criticism, not obnoxious to S. 124-A. Yet it is arguments such as these which form the bulk of these three addresses and the applicant is entitled

to be judged rather by his general tenor and purport than by any selected passages. It must also, in fairness to the applicant, be stated that these speeches are not all mere condemnation. In one passage of the speech of 31st May 1916 he says, speaking of the Government and of the material improvements which the Government has made in the country:

"I do not say that these things have not been done, done well and have been done better by the British Government than they would have been done by the former Governments; this is an honour to them. But should we not tell it to do those things which it does not do?"

If matters rested here, the applicant's defence would, in my opinion, be very strong. Unfortunately matters do not rest here, and there are two or three passages which undoubtedly, as they stand, are to my mind impossible of justification. Nor has Mr. Tilak's learned counsel made any substantial or successful attempt to justify them. If these passages stood alone, or if I could bring myself to think that they fairly reflected the speaker's general meaning, I should feel bound to confirm the Magistrate's order. I do not intend to give these offensive passages further publicity by repeating them in this judgment. I shall sufficiently identify them by saying that one passage, occurring in the first speech, refers to keeping Indians in a position of slavery or servitude, and another passage in the second speech describes the Government as an alien Government looking mainly to its own interest. In my mind the only real difficulty in this case has been to decide whether these passages alone can properly be used as affording sufficient ground for the learned Magistrate's order.

Upon the best consideration that I can give to this difficult question and having regard to the whole tenor of the speeches, I think that the answer should be in the applicant's favour. I think so, not because these passages in themselves can be justified, but because their obvious objectionableness is somewhat mitigated by the context of the arguments in which they occur, and because I do not regard them as fairly characterising the general effect of the speeches as a whole. There is no reason to think that, in these long speeches delivered orally, these particular passages, which occupy no specially prominent place in the addresses, would specially impress themselves on

the minds of the audience so as to override the general effect. That general effect is not, I think, shown to exceed the limits of fair criticism as defined in Expls. Nos. 2 and 3 of S. 124-A. On these grounds I am of opinion that the Rule should be made absolute, the order under revision being set aside. The bonds, if they are executed, must be cancelled and discharged.

Shah, J.—This is an application for revising an order made by the District Magistrate of Poona. The order is made in proceedings taken under S. 108, Criminal P. C., against the petitioner, and directs him to enter into a bond in a sum of Rs. 20,000, with two sureties, each in a sum of Rs. 10,000, to be of good behaviour for a period of one year. The information under S. 108, Criminal P. C., against the petitioner was that he had orally disseminated seditious matter, that is, matter the publication of which was punishable under S. 124-A, I. P. C., by making these speeches on the subject of swarajya or Home Rule, one at Belgaum on 1st May, and the other two at Ahmednagar on 31st May and 1st June last.

The learned District Magistrate has come to the conclusion that these speeches contain matter, the publication of which is punishable under S. 124-A, I. P. C., and the order in question is based on this conclusion.

The principal question to be decided on this application is whether the matter complained of is such that its publication is punishable under S. 124-A, I. P. C. At the outset it may be mentioned that no objection is taken to the main theme of the lectures, viz., swarajya, or Home Rule for India on behalf of the Crown, nor is it suggested that the word swarajya is used in any offensive sense in these speeches. The learned Advocate-General has contended before us, as it was contended before the lower Court, that the matter disseminated by the petitioner is seditious on account of the remarks made in various parts of his speeches imputing dishonest and corrupt motives to Government by law established in British India. It has been argued that the lower Court is wrong in holding that disaffection within the meaning of S. 124-A means "absence of affection." The learned District Magistrate purports to quote the words of

Strachey, J. But it seems to me that in view of the observation of the Full Bench consisting of Farran, C. J., Candy and Strachey, JJ., in the case of *Queen-Empress v. Bal Gangadhar Tilak* (1) and of the judgments in *Queen-Empress v. Ramchandra Narayan* (2), it is clear that disaffection does not mean absence of affection. The section, as it stood, when these cases were decided, was repealed in 1898, and the present S. 124-A was substituted for it. Expln. 1 to the section seems to indicate that disaffection cannot mean absence of affection within the meaning of the section. I agree on this point with the observations of Batty, J., in the case of *Emperor v. Bhaskar* (3). The learned Advocate-General does not contend otherwise; and the point is not of any practical importance in the case.

There has been some argument as to the meaning of the expression "Government established by law in British India:" and the observations of Strachey, J., in *Tilak's* case (1) and Batty, J., in *Bhaskar's* case (3) on this point have been referred to. For the purposes of this case, it seems to me to be sufficient to state that the expression would mean the various Governments constituted by the Statutes relating to the Government of India now consolidated into the Government of India Act of 1915 (5 & 6 Goe. 5, C. 61) and would denote the person or persons authorized by law to administer Executive Government in any part of British India. Mr. Jinnah had argued that all the criticism directed against the Indian Civil Service, generally described as "bureaucracy" in the speeches, cannot under any circumstances be treated as criticism against the Government by law established in British India. I am unable to accept this argument. It may be that the various services under the control of the Government by law established in British India do not form part of the Government within the meaning of the section: and it may be that the criticism directed against any of the services is not necessarily criticism of the Government by law established in British India. But the feelings, which it is the object of S. 124-A to prohibit, may be excited towards the Government in a variety of ways; and it seems to me

that it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case.

It would be a question of fact to be determined in each case with reference to its circumstances. But as a matter of law it cannot be said that the condemnation of a particular service under the Government by law established in British India can never be sufficient to excite any of the feelings prohibited by S. 124-A towards such Government. I now come to the question as to whether the publication of the matter contained in these speeches is punishable under S. 124-A. It is quite clear that the speaker must not bring or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards, His Majesty or the Government established by law in British India; and it is also clear that even in the case of comments falling under Expln. 2 or 3 of the section, this essential condition must be observed. In the present case Mr. Jinnah has laid great emphasis on the fact that throughout the speeches, the speaker has expressed his loyalty to His Majesty. But this cannot avail him. He is not charged with exciting disaffection towards His Majesty. The Crown case is that he has attempted to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India; and it is no answer to this charge to say that he has expressed his loyalty to His Majesty.

The speeches in question were delivered in Marathi and are very long. It is necessary to determine the intention of the speaker in delivering these speeches. The intention must be gathered primarily from the language used; and if on reading the speeches, the reasonable and natural and probable effect of the speeches on the minds of those to whom they were addressed, appears to be that feelings of hatred, contempt or disaffection would be excited towards the Government, the petitioner's case must fail.

2. (1898) 22 Bom 152.

3. (1906) 30 Bom 421.

The question therefore is one of determining the reasonable, natural and probable effect of the speeches taken as a whole on the minds of those to whom they were addressed. I have read these speeches for myself. They have been fully discussed on both sides, and various passages have been referred to. I do not consider it necessary to deal with these passages in detail. The speeches must be read as a whole "in a fair, free and liberal spirit." In dealing with them one "should not pause upon an objectionable sentence here or a strong word there." They should be dealt with "in a spirit of freedom" and "not viewed with an eye of narrow criticism." The case should be viewed "in a free, bold, manly, and generous spirit" towards the petitioner: see *Reg v. Burns* (4). In the present case it is clear from the various passages in the speeches that the avowed object of the petitioner was to create a public opinion in favour of Home Rule for India, and to induce the hearers to join the Home Rule League. It is also clear from the speeches that he did not advocate for the achievement of his object any means other than strictly constitutional means.

Under these circumstances it is clear that in determining the general effect of the speeches care should be taken not to attach undue importance to the objectionable passages. Undoubtedly there are some objectionable passages in these speeches. Particularly the references to the condition of slavery, and to the alien character of the rule are unfair and improper. It seems to me however that the petitioner is entitled to the benefit of the argument that the general effect of the speeches taken as a whole should be considered, as that would be the impression left on the minds of the hearers. It is possible that different minds might estimate this effect differently. Under the circumstances, I have done my best to consider the passages in the speeches in favour of the petitioner on the one hand and in favour of the Crown case on the other, and to estimate their effect. I am unable to say that the natural and probable effect of the speeches taken as a whole on the minds of those to whom they were addressed, would be to bring into hatred or contempt or to excite disaffection towards the Government estab-

4. (1896) 16 Cox C C 355.

lished by law in British India. I am not therefore prepared to hold that the matter disseminated by the petitioner is seditious within the meaning of S. 108, Cl. (a), Criminal P. C. I do not ignore the fact that there are some passages, which, if they stood by themselves, might justify the inference against the accused. But their effect in the course of long speeches orally delivered is a different matter.

The learned Advocate-General has attempted to save the order by urging that even if the publication of the matter be not punishable under S. 124-A on account of the criminal intent of the petitioner not being established, the Court could still make an order under S. 108, Criminal P. C., and that this is a fit case for making the order contemplated by the section. He has relied upon the case of *Sital Prasad v. Emperor* (5). But it seems to me that it is essential under S. 108, Cl. (a), that the matter disseminated must be shown to be seditious. The words of the section are clear and must be given effect to. I do not think that this view renders S. 108, Criminal P. C., unnecessary. It seems to me that the section affords an additional remedy to the Crown which may be more appropriate in certain cases than an actual prosecution on a charge under S. 124-A. I am unable to follow *Sital Prasad's* case (5) in view of the clear words of the section.

I therefore concur in the order proposed by my learned brother.

G.P./R.K. *Rule made absolute.*

5. (1916) 43 Cal 591=34 I C 974.

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BACHELOR AND SHAH, JJ.

Kareem Ranjan Khoji—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 281 of 1916, Decided on 23rd November 1916, from conviction and sentence of Sub-Divisional Magistrate, Thana.

(a) **Bombay District Municipalities Act (3 of 1901), S. 96 (5)—Order under S. 96 cannot be varied or rescinded—Scope of S. 96—It only contemplates application for sanction, reasonable time and issue of order which is final.**

An order once issued under S. 96, Bombay Act 3 of 1901, for the construction of a new building cannot be rescinded or varied from time to time.

The whole tenor of S. 96 of the Act with its various sub-sections and clauses and sub-clauses shows that what is contemplated is an application by the citizen, a period of time during which the Municipality should consider the merits of that application and then the issue of orders once and for all. [P 49 C 2]

(b) Bombay District Municipalities Act (3 of 1901), S. 96—Order under S. 96 is final—Conviction for disobedience of variation in order is bad and illegal.

The accused obtained permission from the Managing Committee of the Municipality to build a house with a gallery. While the building was under construction, accused received an order that the previous permission was revoked and that his building must be so modified as to leave a certain setback to the detriment or the omission of his gallery. This order was the result of a resolution passed by the general body. The accused however continued the construction in conformity with the first order. He was convicted under S. 96 (5), Bombay Act 3 of 1901 :

Held : that the conviction was illegal.

[P 49 C 1]

W. B. Pradhan—for Accused.

Jayakar and B. V. Desai—for Municipality.

Batchelor, J.—This case, which falls under the Bombay District Municipalities Act (3 of 1901) is, I think, best decided on its own facts without any attempt to lay down any general proposition from the complicated intricacies of the Statute. Now the simple facts which we have before us here are these : On 12th January 1916 the present applicant obtained from the Managing Committee of the Municipality a perfectly valid and legal permission to build his house with a certain gallery. He consequently began the building. On 26th March following, there was communicated to him from the Municipality an order that the previous permission was revoked and that his building must be so modified as to leave a certain set-back to the detriment or the omission of his gallery. This order was the result of a resolution of the general body on the preceding day, 25th March. The applicant, notwithstanding this last-mentioned order, proceeded with his building in compliance with the permission of 12th January. Because he did so, he has been convicted under S. 96, Cl. (5), Bombay District Municipalities Act, and has been sentenced to a fine of Rs. 60.

I am clearly of opinion that on these facts the applicant was not guilty of any offence under the section. As I have said, the permission accorded to him by the Managing Committee in January was

entirely within the powers of the Managing Committee and was lawful and valid. It would be extremely inconvenient in practice if a lawful permission accorded by the Managing Committee was subject at any future date to be cancelled by the general body. For it is plain that no citizen would then have notice as to when he might safely begin his building. If however words clearly importing such a power of subsequently overriding the permission were discoverable in the Statute, there would be no alternative but to give effect to them. No such words are however discoverable. On the contrary the whole tenor of S. 96 of the Act, with its various sub-sections and clauses and sub-clauses, seems to me to show that what is contemplated is an application by the citizen, a period of time during which the Municipality should consider the merits of that application and then the issue of orders once and for all. Sub-S. 5, it is to be observed, speaks of "such legal orders of the Municipality as may be issued under this section." It does not say such legal orders as may from time to time be issued under the section, and any such latitude of construction would, in my opinion, render these sections unworkable in practice. I am of opinion therefore that both the terms of the Statute and the reason of the thing are in favour of the present applicant. I would therefore make the Rule absolute, set aside the conviction, order the applicant to be acquitted and discharged and direct that the fine, if paid by him, be refunded to him.

Shah, J.—I agree.

G.P./R.K. *Rule made absolute.*

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BATCHELOR AND SHAH, JJ.

Pandu Namaji Gavande—Applicant,
In re.

Criminal Revn. Appln. No. 274 of 1916, Decided on 23rd November 1916, from order of Sess. Judge, Thana.

(a) Penal Code (1860), S. 193—False statement must have misled or deceived the Court.

The essence of the offence of perjury consists in an attempt to mislead and deceive the Court. [P 51 C 1]

(b) Penal Code (1860), S. 193—Deposition must be read as whole—False statement withdrawn cannot be subject of perjury.

The deposition given by a witness must be read as a whole and a witness must always be

given an opportunity of correcting any answer made by him. [P 51 C 1]

Where therefore a witness makes a false statement and subsequently corrects in the course of his examination, it is undesirable that he should be subjected to a prosecution for perjury as he withdraws the lie and leaves the Court under the impression of the truth: (1890) *Unrep Cr C* 502, *Ref.* [P 51 C 1]

Strangman and *G. S. Rao*—for Applicant.

Setalvad, *Coyajee*, *W. B. Pradhan* and *Crawford*, *Brown & Co.*—for Opponent.

Batchelor, J.—This application arises in the following circumstances: The applicants are, or were, certain tenants of the opponent Muhammad Ismail Muhammad Abdulla, who is described before us as enjoying the title of Khan Sahab and the dignity of an Honorary Magistrate. In a prosecution of the applicants before the Sessions Court, the opponent in the course of his deposition made upon solemn affirmation the following statements: Answering the question whether he had been instrumental in financing the prosecution through his clerk Narayan, he said:

"I did not send him (Narayan) to instruct the pleaders from the commencement. I am not concerned with the result of the case. Hasu Ram Patil pays Mr. Rege, Pleader, and also the other complainant Bala Ramji, etc. The karkun did not come here to instruct Mr. Rege. I did not retain any Pleader for this case before the First Class Magistrate. I do not know that they (i.e. the pleaders) were paid each Rs. 50 per day. I have not spent a single pie for this case. I do not know whether my karkun went to watch the case before the First Class Magistrate. I do not know whether he went to give instructions to Mr. Jamshedji and Mr. Kaka Patil at Alibag."

After those statements were sworn to, and while the opponent's deposition was still unfinished, the Court rose for lunch and on its re-assembling the opponent's clerk Narayan was forthwith put into the box instead of the opponent. From Narayan's evidence it was manifest that the foregoing statements of the Khan Sahab and the Honorary Magistrate were false in fact and false to his knowledge. This therefore was put to him when he was re-summoned to the witness-box, and being thus confronted with the evidence of Narayan he said:

"I admit what I stated this morning about these facts is not true. It is also not true that I did not know, as I stated above, about Narayan's coming here and engaging Mr. Rege, etc."

The learned Assistant Sessions Judge, Mr. J. A. Saldanha, being satisfied that there was *prima facie* ground for prosecuting the opponent for perjury in re-

gard to his first statement, granted sanction for that prosecution. The sanction however has been revoked by the Sessions Judge, Mr. C. N. Mehta, who was of opinion that it was inexpedient that the prosecution should proceed. The point is thus put by Mr. Saldanha and put, as it seems to me, with perfect fairness:

"The opponent Khan Sahab had to confess that he had deputed his karkun Narayan Waman Deshpande to engage pleaders both at Alibag and here and supplied him with funds to pay those pleaders. But this confession was extracted from him by counsel for the accused after he had once forsworn all connexion or concern in the prosecution and trial, when he was brought face to face with the testimony of his karkun to the contrary."

That is the description by the learned Judge who gave the sanction. Now this is the description by the learned Judge who revoked the sanction, Mr. C. N. Mehta: "It seems to me," he says:

"that there are *prima facie* grounds for believing that the applicant deliberately and intentionally made the statement referred to in para. 6 of the lower Court's judgment and that according to his own admission in the course of the same deposition later on, that statement is untrue. It was not a statement inadvertently or hastily made in the course of his cross-examination; but questions after questions were put to him on the same point and there can be no doubt that he deliberately replied to them, and that he was at that time determined not to admit that he was financing the litigation, although in fact he had been doing so."

This is the state of the facts, and these facts have not been challenged in the argument before us. They stand indeed upon the express admission of the opponent himself, and upon his own admission I have on the record now before us, no doubt but that the original denial of financing this litigation was false and intentionally false, and that the retraction of that denial was prompted by the circumstance that it became impossible further to persist in it after its falsehood had been disclosed by the opponent's own clerk. In this state of facts we have had from Mr. Strangman a particularly forceful and persuasive argument with which I am myself much in sympathy. But the question before us is not one of sympathy, but of the exercise of our judicial discretion in accordance with the established practice of this Court, unless some overwhelming reason should exist for departing from that practice. I am not aware of any such overwhelming

reason, and we must therefore I think adhere to the practice. That practice upon this point was laid down so long ago as 1890 by Birdwood and Jardine, JJ. in *Queen-Empress v. Gopal* (1), where the learned Judges observed that a deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him. The present case does not, I think, in law substantially differ from a case of more frequent occurrence where a witness, having made a false statement, is cautioned by the trying Judge and is informed of various circumstances which seem to establish the falsehood of that statement; and the witness after such caution acknowledges that his earlier statement was false and corrects it. In such circumstances, speaking within my own experience, I have not known any case where any Judge has thought it desirable to subject such a witness to a prosecution for perjury. And that a Judge should refrain from such directions seems to me not unreasonable, when it is remembered that the essence of the offence of perjury consists, as I take it, in an attempt to mislead and deceive the Court. In such a case, as we have here, it cannot be truly said that the opponent left the Court under the lie with which he began by attempting to deceive it. On the contrary, before his deposition was finished, he withdrew the lie and left the Court under the impression of the truth. It may well be, and in this case I think is, the fact that his motive in thus withdrawing his lie was a motive which does him no credit. That however is not, it seems to me, a decisive consideration upon this question of discretion.

On the whole therefore, though the case is a bad one of its kind, I am not prepared to say that we should be justified in altering the practice which has apparently prevailed in this Court since 1890 and in reversing the lower Court's order made in the exercise of its discretion. I would therefore discharge the Rule. But at the same time, I think that it is expedient to afford the Government an opportunity of reading this record and of considering whether a person who on his own showing has deliberately attempted to mislead a Court of justice in an important case is

1. (1890) Unrep Cr C 502.

fit to continue the exercise of the powers of an Honorary Magistrate. I think therefore, that copies of Mr. Saldanha's judgment, of Mr. Mehta's judgment and of the judgment of this Court should be forwarded to Government for their consideration.

Shah, J.—I am of the same opinion.
G.P./R.K. *Rule discharged.*

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BEAMAN AND HEATON, JJ.

Jekisondas Harkisondas — Defendant
—Appellant.

v.

Ranchoddas Bhagwandas—Plaintiff—Respondent.

Second Appeal No. 577 of 1915, Decided on 5th September 1916, from decision of Dist. Judge, Surat, in Appeal No. 108 of 1913.

(a) Tort — Liability — Encouragement to break marriage contract is not actionable—Father's encouragement to grown up son marrying girl betrothed to another not procuring breach of marriage contract — He is not liable.

Per Curiam—A mere encouragement offered to a party to a contract of marriage to break it, where the fulfilment of the contract is rendered impossible, is not actionable. [P 54 C 2]

Defendant 1 agreed to give his daughter in marriage to the plaintiff and the girl was actually betrothed to him. Defendant 1 having refused to perform his obligation, the plaintiff brought the present action against him for damages. Defendant 2 was impleaded on the ground that he procured to breach of the contract and induced defendant 1 to consent to the marriage of his daughter with defendant 2's son. The trial Court found, and its finding was upheld in appeal, that defendant 2 had a hand in bringing about the breach of contract and it decreed the claim against both defendants. On appeal by defendant 2:

Held: that the finding of the lower Court having been arrived at by a process of inference from the circumstance that defendant 2 approved and encouraged the action of his grown-up son in obtaining defendant 1's daughter in marriage, it was not a case of knowingly procuring the breach of an existing contract by defendant 2, which alone would make him liable under the principle of *Lumley v. Gye*, (1853) 22 L J Q B 463; 29 Bom 682; *De Francesco v. Barnum*, (1890) 45 Ch D 430; *Fred Wilkins & Bro. Ltd. v. Weaver*, (1915) 2 Ch 322; *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A C 239; *Allen v. Floyd*, (1898) A C 1, *Ref. Case law discussed.* [P 54 C 2]

(b) Practice—Precedents—English decisions are not applicable to breach of contract of marriage in India.

Per Beaman, J.—The principle of *Lumley v. Gye*, (1853) 22 L J Q B 463=2 El & Bl 216, should not be extended in India to contracts of every kind, irrespective of their own special features and character, and the true principle governing

cases of breach of promise of marriage is correctly stated in the dissenting judgment of Coleridge, J., in that case. [P 52 C 2]

(c) **Tort — Liability — Inducing betrothed girl to marry himself is not actionable—It is analogous to son's father inducing betrothed daughter's father to give her to his son—Procuring or enticement is actionable when result of conspiracy.**

A person who induces a girl betrothed to another to break that engagement and marry him commits no tort which would give the aggrieved party a cause of action against him. And the principle is the same when the inducement is made to the father of the girl by the father of the boy who is in fact married. [P 53 C 1]

The procuring or enticement may be actionable where it is the result of a conspiracy. Before a conspiracy can be actionable it must be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. [P 53 C 2]

(d) **Tort—Breach of marriage contract—Liability—Taking active and effective part in bringing about breach is actionable.**

Per *Heaton, J.*—The taking of an active and effective part in the negotiations or proceedings which induce a party to a contract of marriage to break it is actionable. [P 55 C 2]

P. B. Shingne and Jayant G. Rele—for Appellant.

K. N. Koyajee—for Respondent.

Beaman, J.—This case has given rise to a very interesting argument. The suit was brought by the plaintiff to recover damages from defendant 1, the father of a girl who had been promised in marriage to the plaintiff and actually betrothed, and from defendant 2, on the allegation that he had procured the breach of the prior contract with the plaintiff and induced defendant 1 to consent to the marriage of his daughter with defendant 2's son. The lower Courts found that although the son of defendant 2 was a major, defendant 2 had, to use the words of the Court of first appeal, a hand in bringing about the breach of the first contract.

The case is virtually the same in principle as that of *Khimji Vasanji v. Narsi Dhanji* (1), in which, sitting alone on the original side of this Court, I examined critically the whole English case-law out of which the present doctrine has been slowly evolved. Looked at merely as a theoretical discussion I see no reason yet to modify any part of the reasoning or conclusions which I then used and reached. Though that point did not engage my attention in *Khimji's* case (1), it struck me in the course of the argument here that an additional

1. (1905) 29 Bom 682=28 I C 408.

difficulty would be caused if the plaintiff in actions of this kind joined a mere tort-feasor with the breaker of the contract. I find that this was done in two comparatively recent cases, *De Francesco v. Barnum* (2) and *Fred Wilkins & Bro. Ltd. v. Weaver* (3). The question does not appear to have been even raised much less to have occasioned the learned Judges concerned any doubt or difficulty. The least examination will show that the causes of action are totally different. I should have thought that on objection taken to the array in such a suit the plaintiff would surely have been put to his election either to proceed against one defendant for breach of contract, or against the other on the case. Both the cases, *Fred Wilkins & Bro. Ltd. v. Weaver* (3) and *De Francesco v. Barnum* (2), were founded upon *Blake v. Lanyon* (4), an old case of 1795, where it was held that continuing a servant in employment after notice that he was in the service of another gave a good cause of action. *Lumley v. Gye* (5) first extended the old rule of law governing all master and servant cases of the kind to analogous relations not strictly of the kind originally contemplated by the Statute of Labourers. And in *De Francesco v. Barnum* (2) the facts were, so far as the contract went, virtually the same as in *Lumley v. Gye* (5).

But in the case of *Exchange Telegraph Company v. Gregory & Co.* (6), decided in 1896, Rigby, L. J., in the course of his judgment, gave exactly such a case as we have before us, *mutatis mutandis*, after making allowance for the differences between the marriage customs of England and India, as a *reductio ad absurdum* of the contention that the principle of *Lumley v. Gye* (5) should be extended to all contracts. Whatever then is now to be said merely from a theoretical point of view for or against the decision in *Lumley v. Gye* (5), I adhere emphatically to the opinion I expressed in *Khimji's* case (1) that it should not be extended anywhere, least of all in India, where it is not a binding authority, to contracts of every kind irrespective of their own special features and character.

2. (1890) 45 Ch D 430.

3. (1915) 2 Ch 822.

4. (1795) 6 T R 221.

5. (1853) 22 L J Q B 463.

6. (1896) 1 Q B 147.

I am still of opinion that a person who induces a girl betrothed to another to break that engagement and marry him has committed no tort which would give the aggrieved party a cause of action against him. Nor can I see that the principle is affected by substituting first the father of the betrothed girl for the girl herself, and next the father of the boy or man whom in fact she marries for the husband. In the case of *South Wales Miners' Federation v. Glamorgan Coal Co.* (7), Earl Halsbury says: "To combine to procure a number of persons to break contracts is manifestly unlawful." This takes us back at once to the element of conspiracy with which I dealt fully in my former judgment. But it is plain that where the element of conspiracy is wanting the principle of such cases is materially impaired, and it will be an open question whether it can be applied at all, and if it can, then how far? If we next turn to Lord Lindley's judgment in the same case, we shall see still more clearly that the old law of conspiracy is the foundation of the decision. The learned Lord goes on to say:

"To break a contract is an unlawful act or, in the language of Lord Watson in *Allen v. Flood* (8), 'a breach of contract is in itself a legal wrong.' The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach."

This goes to the root of the matter and would need very careful and subtle analysis before its whole content could be exhausted. It is, of course, true that breaking a contract is doing a "wrong" in the ordinary legal sense. The law provides a remedy which in itself presupposes a wrong. But when we turn back to Erle, C. J.'s, formula, we see that what he says is 'procuring the violation of an existing right, etc'. And the question thus opened is what is a man's legal right under a contract? Certainly not always to have it performed. In a vast majority of cases it goes no further

than to have money compensation for any loss which the promisee may have suffered owing to nonfulfilment. In dealing with cases of conspiracy it is very necessary to insist upon the object of the conspirators being unlawful, and that is why in the case I am considering the learned Law Lords declared that a combination to compel people to break their contracts is a conspiracy to do an unlawful thing. For before a conspiracy can be actionable it must be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. Eliminate the element of conspiracy and it becomes extremely difficult, if not impossible, to say that being the instrument (I use that phrase in preference to "procuring" which implies knowledge) of breaking an existing agreement per se makes such instrument liable in tort. But if not, then knowledge at any rate becomes essential, and again it becomes extremely difficult, remembering the wide reach of legal malice, to distinguish this from malice.

But the point of theoretical importance is that from the purely legal standpoint the injury done to the first promisee is exactly the same whether he in whose favour the intended contract is in fact performed knew or did not know of the prior agreement. To take the case before us. A girl is betrothed to A . . . X persuades her to marry him. Now if X knew of the girl's engagement to A, he would be liable under the principle of *Lumley v. Gye* (5). But if he did not, he would not. In either case the injury to A would be exactly the same, and that is the only "wrong" of which the law has any knowledge. Morally X might be more culpable in one case than in the other, but so far as A is concerned the "wrong" would be exactly the same. So that it appears that if the old doctrine of conspiracy, procuring or enticement is to be extended to such cases, then "malice" remains, as it always was considered to be before certain dicta of the most eminent Judges in *Lumley v. Gye* (5) string of decisions, the gist of the action. There is a passage in Erle, J.'s judgment in *Lumley v. Gye* (5) which suggests that long before that case the wide principle on which it rests had been recognized and given effect to. Two cases are cited in support of this:

7. (1905) A C 239.

8. (1893) A C 1.

Green v. Button (9) and *Sheperd v. Wakeman* (10), but both were actions on the case for false and malicious misrepresentations and have nothing whatever to do with the case limited to merely persuading one bound by contract to break it.

But if we survey the whole field of English law before *Lumley v. Gye* (5), I do not believe that a single case can be found in which (a) there was not conspiracy ; (b) or the use of unlawful means ; (c) or the act complained of was not unlawful in itself ; and (d) where in cases of procuring the breach of a contract of service, a joint action lay against the breaker and him who procured the breach. On that last point I may be wrong. It is not of the first importance. The recent cases to which my attention was drawn in the course of the argument show that it has not been considered to be so. But the other points are of capital importance in considering whether (a) the doctrine of *Lumley v. Gye* (5) is suitable to Indian conditions and need be adopted here at all ; (b) whether, if in proper cases it should, that doctrine could possibly be so far extended as to take in every form of contract. I am aware that as recently as July of this year a Division Bench of this High Court (Scott, C. J. and Heaton, J.), on a first appeal (No. 56 of 1913) found facts in a case almost exactly the same as this, which led them to the conclusion that the person situated there, as the defendant-appellant is here, was liable. And that judgment is, of course, not only entitled to the highest respect but is binding as far as it goes. It is clear however that it turned upon the facts found in the case and those facts are expressed in the judgment in terms of conspiracy.

I would only add that after having on more than one occasion studied the case of *Lumley v. Gye* (5), I can find no answer to the reasoning of Coleridge, J., in his weighty dissenting judgment. Although it was against the majority of the Court, and the decision of the majority was again affirmed by a majority in the House of Lords, *Bowen v. Hall* (11), as a mere question of theoretical reasoning I shall always remain, with respect,

of the opinion that the true principles governing this class of cases are to be found correctly stated in the judgment of Coleridge, J. And this at least might give us, in the Courts of this country, pause before being too ready to introduce the rule laid down in *Lumley v. Gye* (5). As far as I can see we are not bound to adopt it at all, much less to extend it in all directions. No Court in England yet has ever gone the length or anywhere near the length of doing what we are asked to do in this case. Speaking for myself I am very strongly of opinion that there is no good cause of action against the defendant-appellant. Coming now to what is common ground between my learned brother and myself having regard to the essential ingredients of the action in tort brought against defendant 2, we are not satisfied that the findings in either Court below, badly expressed as they are, amount to what is necessary to be found before damages can be awarded in such an action on the case. As far as we can gather from the judgment of the learned Judge of first appeal, what he does find is that the son of defendant 2 married the daughter of defendant 1 who was at the time betrothed to the plaintiff and thereby rendered the fulfilment of the contract between the plaintiff and defendant 1 impossible of fulfilment.

He further appears to find upon a process of inference from materials given, that defendant 2 had a hand in this matter. But when we look at those materials and the vague manner in which the conclusion has been expressed, it seems to us that he meant no more than to find that defendant 2 approved and encouraged the action of his grown-up son in obtaining defendant 1's daughter in marriage. Now if this were the real limit of the finding of fact in both the Courts below, it will not amount, in our opinion, to that form of knowingly procuring the breach of an existing contract by defendant 2, which alone would make him liable under the principle of *Lumley v. Gye* (5). We do not understand that the Court of first appeal either did find or meant to find that defendant 2 directly and personally attempted to influence defendant 1 to break his contract with the plaintiff. We do not understand that the Court meant to find that there was anything

9. (1835) 2 C M & R 707.

10. (1661) 1 Sid. 79.

11. (1881) 6 Q B D 333.

like conspiracy between defendant 2 and his son to bring about that result. In the absence of such findings we must suppose, particularly having regard to the grounds of inference shown, that the learned Judge of first appeal meant no more than what he said and that is that defendant 2's part in this matter was limited to an encouragement, more or less tacit at first, to his son in what that son was doing of his own accord. That being so there would be no sufficient foundation for a verdict against this defendant in a suit of this kind. Upon that ground I am in entire agreement with my learned colleague. We ought not to accept the decree of the lower Court as regards defendant 2, while, of course, we do accept it as regards defendant 1 and we must now reverse so much of the decree of the Court below as is adverse to and affects defendant 2 and direct that the suit against him be dismissed with all costs throughout.

Heaton, J.—I will assume for the purpose of this case that if it be proved that defendant 2 procured the breach of the contract for the marriage of the daughter of defendant 1 to the plaintiff, then defendant 2 would be liable in damages. The question therefore is whether it has been found as a fact by the lower appellate Court that defendant 2 did procure the breach of this contract. The first Court found in the affirmative on this issue: whether defendant 2 is proved to have had a hand in bringing about the breach of the contract. Then in appeal the lower appellate Court raised this point: whether the lower Court erred in holding that defendant 2 was responsible for the acts of his son.

I do not understand that the trial Judge based the liability of defendant 2 on the fact that he was responsible for the acts of his son, the person who eventually did marry the daughter of defendant 1. I gather that the trial Court based the liability on the finding that defendant 2 had some hand in bringing about the breach. If the Judge in appeal was under the impression that defendant 2 would be liable in damages not for a thing that he himself had done, but because in some unexplained way he was responsible for what his son had done, then I think he was entirely wrong. However in his judgment he

also finds, as we see when we come to read it in detail, that defendant 2 had a hand in the matter, the matter being the breach of the contract. What that means again is difficult to understand. If it means that defendant 2 personally had taken an active and effective part in the proceedings or negotiations, whatever they might be, which had induced defendant 1 to break off the contract with the plaintiff, then it is a finding which properly supports the decree. But I find it very difficult to believe that the appellate Court by its expression did mean anything of this kind, because the circumstances he enumerates as the basis of his inference do not in my judgment at any rate in any way justify such a conclusion as that defendant 2 did personally take an active and effective part in bringing about the breach of contract. There are two matters in particular which, it seems to me, it would be very important to consider in dealing with this matter. The first is, what price, if any, was paid on the occasion of the girl's marriage to defendant 2's son and who it was who provided the money; and the second matter would be the extent to which defendant 2's son was dependent on his father and under his influence; and whether the circumstances suggested that it would be improbable that defendant 2's son would be taking an active part of his own in the matter and probably that the active part would be taken by the father. Neither of these points has been considered in the judgment of the appellate Court and from the points it has considered I am unable to find that the appellate Court meant to find as a fact that defendant 2 did take an active and effective part in the matter which resulted in the breach of the contract. Therefore I am unable to find from the judgment appealed against that those facts are established which would justify throwing any portion of the damages on defendant 2. Therefore I agree to the order proposed.

G.P./R.K.

Decree varied.

A. I. R. 1916 Bombay 55

SCOTT, C. J. AND HEATON, J.

Chandulal Dalsukhram—Applicant.

v.

Jeshangbhai Chhotalal—Opponent.

Civil Ex. Appln. No. 99 of 1916, Decided on 15th December 1916.

Civil P. C. (1908), Ss. 145 and 115—Sureties, liability continues even for legal representative of judgment-debtor brought on record and he cannot be discharged until execution—Wrong order in discharging surety can be interfered with under S. 115.

Defendant's property was attached before judgment and the opponent stood surety for him. The defendant died before the hearing of the suit and his widow was brought on the record as his legal representative. The surety thereupon applied to the Court that he might be discharged and the Court ordered accordingly:

Held: (1) that inasmuch as the cause of action survived against the legal representative of the defendant who had been brought on the record, the surety's liability continued; (2) that the liability of the surety could not be determined until the time for execution had arrived; (3) that the High Court had power to interfere with the order discharging the surety under S. 115, Civil P. C., either on the ground that the Court had committed a material irregularity in the exercise of its jurisdiction, or that there was a total want of jurisdiction: 24 *Mad* 637 and 25 *W R* 250, *Dist.* [P 56 C 2]

G. N. Thakor—for Applicant.

T. R. Desai—for Opponent.

Scott, C. J.—In this case there was an attachment before judgment, and the opponent stood surety under a surety bond for the defendant agreeing with the Court that the defendant should, when the Court so directed him, produce in Court Rs. 2,167-6-0 and costs, or the amount which the Court might direct, and that if he failed so to produce it, the surety bound himself to pay at the order of the Court such sum as might be ordered by the Court to be paid by the defendant. By reason of the surety bond the defendant was enabled to deal with this property freed from attachment. He died before the hearing of the suit was arrived at in January 1916. The plaintiff at once had his widow substituted as his representative, and she is now the defendant in the suit. The surety afterwards applied to the Court that he might be discharged, that his surety bond should be cancelled, and the Court ordered that the surety should be discharged, being of opinion that *prima facie* on the defendant being dead it is beyond the power of a Court to order him to pay anything, and when this cannot be done, no obligation would attach on the surety, for his turn of payment would only come on the default of the original defendant in making the payment. That however is not correct, for the cause of action survives against the representative of the defendant, and the representative of the

defendant has been brought on the record, and will, if the plaintiff's case is tried and succeeds, be liable to satisfy the plaintiff's claim out of the assets of the deceased. The rulings followed by the learned Judge, *Krishnan Nayar v. Ittinan Nayar* (1), which was a case of a guarantee for the production of the person of the defendant, and *Mohip Narain v. Shaw* (2), which was upon its true construction a guarantee for only a limited period, are not in point in connexion with the facts of this case. The liability of the surety cannot be determined until the time for execution has arrived. S. 145, Civil P. C., provides that

"where any person has become liable as surety . . . for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit . . . the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of S. 47."

It is in connexion with this provision of the Civil Procedure Code that the question arises whether we ought not to interfere under S. 115, Civil P. C., on the ground that the Court has committed a material irregularity in the exercise of its jurisdiction. The manner in which the liability of the surety is to be enforced is specified in S. 145, and it has to be enforced at a particular stage of the proceedings. The proceedings had not come to an end, because they have been revived by the substitution of the widow of the defendant, and the stage has not been reached at which the liability of the surety can be decided. In my opinion therefore the order of the Court discharging the surety is altogether premature and should be set aside. The surety must pay the costs of these proceedings.

Heaton, J.—I agree with the order proposed. The result stated is necessarily arrived at whether we take the view that there has been want of jurisdiction or a serious irregularity in the exercise of jurisdiction. It seems to me that there are reasons of considerable cogency which point to a want of jurisdiction, but as the result remains unaffected, whether it is attributed to that ground or to a serious irregularity in the

1. (1901) 24 *Mad* 637.

2. (1876) 25 *W R* 250.

exercise of jurisdiction, it does not seem to me very profitable to discuss which of the views is the one which ought to prevail in this case.

G.P./R.K.

Order set aside.

A. I. R. 1916 Bombay 57

BATCHELOR AND SHAH, JJ..

Pandurang Laxman Uphade — Auction-purchaser—Applicant.

v.

Govind Dada Uphade — Judgment-debtor—Opponent.

Civil Extra. Appln. No. 337 of 1915, Decided on 5th April 1916, against order of Dist. Judge, Nasik, in Misc. Appeal No. 8 of 1915.

(a) Civil P. C. (1908), O. 21, R. 89—Application to set aside auction sale by judgment-debtor after transferring property is maintainable.

A judgment-debtor who has transferred his interest in the property to a third person after the Court-sale has still a right to make an application to have the sale set aside under O. 21, R. 89, Civil P. C., 1908, being in the eye of the law the person owning the property : 34 *All* 186 and *A I R* 1914 *Mad* 287, *not Foli.*

[P 58 C 2]

(b) Civil P. C. (1908), O. 21, R. 89—Object of, stated.

The object of R. 89, O. 21, Civil P. C. 1908, is not merely or not specifically to preserve the immovable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immovable property shall not at court-sales be sold at inadequate prices.

[P 58 C 1]

(c) Civil P. C. (1908), O. 21, R. 89 — Purchaser acquiring title before auction sale can apply under R. 89.

Per *Batchelor, J.*—The change brought about by R. 89, O. 21, Civil P. C., 1908, may be understood as embodying the desire of the legislature to make it clear that a purchaser acquiring title before the auction-sale is competent to apply under this provision of the law : 21 *Mad* 416 and 23 *Bom* 450, *Ref.*

[P 57 C 2]

W. J. Nimbkar—for Applicant.

K. N. Koyajee—for Opponent.

Batchelor, J.—The question raised in this application is one of some difficulty and arises under O. 21, R. 89 of the present Code. The circumstances under which it arises are these : In execution of a decree the judgment-debtor's property was sold by auction and was purchased by the present applicant for a sum of Rs. 166. Thereafter, and before the auction sale was confirmed, the judgment-debtor for a sum of Rs. 500 privately sold the property to one Gangaram, a stranger. Then within thirty days of the auction-sale the judgment-debtor applied under O. 21, R. 89, to set

aside the sale. The trial Court dismissed his application, but the District Court has allowed it, and from the District Court's order this application is brought by the auction-purchaser.

The question is, whether it is open to the judgment-debtor to make this application under O. 21, R. 89, after he has by private sale transferred or attempted to transfer the property to a third party, such private sale being made after the sale by auction. Under O. 21, R. 89, an application such as this can be made by any person either owning the property or holding an interest therein by virtue of a title acquired before the Court sale. It is not pretended that the judgment-debtor can come in as a person holding an interest acquired before the Court sale, but it is claimed that he can apply as being in the eye of the law the person owning this property. Now the words which I have quoted from R. 89 differ from the words in which in the Code of 1892 the corresponding enactment was phrased. For there under S. 310-A of the Act, a section which was introduced by the Amending Act (5 of 1894), such an application as this could be made by "any person whose immovable property has been sold under this chapter." No doubt at first sight it would appear that the generality of the words of S. 310-A has been cut down and restricted by the phraseology of the present R. 89. But it appears to me that the alteration of language effected by the present rule is sufficiently explained by reference to the conflict which there previously was as to the position of a purchaser acquiring title before the auction-sale.

In *Srinivasa Ayyangar v. Ayyathorai Pillai* (1), for instance, it was held that such a purchaser could apply, whereas the contrary view was adopted in *Ramchandra Dhondo v. Rakhmalai* (2). I think therefore that the change brought about by R. 89 may be understood as embodying the desire of the legislature to make it clear that a purchaser acquiring title before the auction sale was competent to apply under this provision of the law. So far therefore there would appear to be no reason for doubting the correctness of the District Judge's view. But the applicant has relied upon the

1. (1898) 21 *Mad* 416.

2. (1899) 23 *Bom* 450.

decisions in *Ishar Das v. Asaf Ali Khan* (3) and *Adapa Subbarayadu v. Tippabhotlallakshminarasamma* (4), which are undoubtedly in favour of that construction of R. 89 for which he contends. I need not discuss the Madras decision in detail, because the stronger case in the applicant's favour is admittedly the Allahabad ruling. It is enough to say, with respect, that I am not able to adopt the view that it is open to the subsequent purchaser to apply under this rule, for, as it seems to me, he is excluded by the terms of the rule.

The decision in the Allahabad High Court followed upon the argument that R. 89 gave judgment-debtors a last chance of saving the property for themselves and that it was no part of the legislature's intention that the property should be saved for persons to whom it might be privately sold after the auction sale had taken place. While fully conscious of the weight due to this argument both on its own merits and by reason of its acceptance by the learned Judges of the Allahabad Court, I cannot but think with very sincere respect that there is another aspect of the question which also must be regarded. For, as I understand these provisions of the law, their object is not merely or not specifically to preserve the immovable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immovable properties shall not at court-sales be sold at inadequate prices. If that is an important consideration, then it follows that in such a case as this it is no answer to the judgment-debtor to say that even if his application be granted, the immovable property will still be lost to him.

The reply would be that the loss of the immovable property is now inevitable, but that the Court will be realizing the intentions of the legislature if it construes these provisions so as to ensure that the monetary loss falling upon the judgment-debtor be as little as possible. For myself I can see no serious difficulty in holding that for the purposes of the rule the judgment-debtor in the position of the present applicant is still the owner of property in the eye of the law, the auction-sale being still unconfirmed.

That position must, I think, be held either by him or by the subsequent vendee, and in my view it clearly does not belong to the subsequent vendee, because he has not acquired any title nor can he acquire any title until the auction-sale has been set aside.

The case does not, I think, essentially differ from the case where there is nothing between the judgment-debtor and the third party, except an agreement that the third party will purchase at a higher value if the judgment-debtor can succeed in getting the auction-sale set aside, and in that case it appears to me clear that the judgment-debtor would be entitled to come in under R. 19. I do not think that he is in any materially worse position because there has passed between him and the stranger a conveyance which confessedly is not and cannot be operative, inasmuch as the auction-sale is still subsisting. On these grounds I am of opinion that the view taken by the District Court is right, and I would discharge the rule with costs.

Shah, J.—After hearing the arguments again in this case, I am of opinion that the judgment-debtor has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of R. 89, O. 21, in spite of the fact that he has transferred his interest in the property after the court-sale. The transfer by him after the auction-sale is, in my opinion, inoperative so long as the sale subsists, and it could take effect only if the sale is set aside on an application under R. 89.

Having regard to the object and scope of this rule, it seems to me that the judgment-debtor must be deemed to own the property for the purposes of the rule. There is no reason to suppose that the object of the rule is to save the immovable property only for the benefit of the judgment-debtor. But it seems to me that it is within the scope of the rule to enable the judgment-debtor, if possible, to prevent the sale of his property by the Court for an inadequate price. One of the ways in which the judgment-debtor could secure this result would be that he might procure a purchaser for a higher price and thereby enable himself to deposit the necessary amount as required by the rule. He might either agree to sell or sell the property to a

3. (1912) 34 All 186=13 I C 134.

4. A I R 1914 Mad 287=38 Mad 775=22 I C 193.

third person subject, of course, to the condition that the court-sale is set aside. This very case affords an apt illustration of the manner in which the judgment-debtor may be able to take advantage of this rule.

The property in question is sold to the auction-purchaser for Rs. 166, whereas the judgment-debtor would be able to realize Rs. 500 for the same property by a private sale. Even though the judgment-debtor would not be able to retain the immovable property if the sale were set aside, it is clear that the setting aside of the sale would be highly beneficial to him under such circumstances. It cannot and ought not to make any difference in the result whether he merely agrees to sell or actually sells the property subject to the auction-sale being set aside. I do not see any reason to hold that the rule refers to the ownership or interest as existing at the date of the application. It seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the rule, provided he owns it or holds an interest therein at the date of the sale by the Court. The words "at the date of the application" are not to be found in the rule, and I do not see any good reason to read the rule as if the words were inserted therein.

Apart from the decided cases there is no difficulty in accepting the view which has found favour with the lower appellate Court in this case. The learned pleader for the applicant here has however relied upon *Ishar Das v. Asaf Ali Khan* (3) and *Adapa Subbarayadu v. Tippabhotlalakshminarasamma* (4), which undoubtedly support his contention that the judgment-debtor who has transferred his interest in the property to a third person after the court-sale has no right to make an application to have the sale set aside under R. 89. I have carefully considered these decisions. I regret that I am unable to follow them. These two decisions do not seem to me to be quite consistent with each other; and both of them appear to me to be based either upon too restricted a view as to the object and scope of the rule or upon an interpretation involving the reading of certain words in the rule which do not occur therein. I therefore

agree that the rule should be discharged with costs.

G.P./R.K.

Rule discharged.

A. I. R. 1916 Bombay 59

SCOTT, C. J. AND HEATON, J.

Motibhai Jijibhai—Plaintiff—Appellant.

v.

Desaibhai Gokalbhai — Defendant—Respondent.

Second Appeal No. 659 of 1915, Decided on 18th September 1916, from decision of Asst. Judge, Ahmedabad, in Appeal No. 364 of 1912.

Bombay Land Revenue Act (5 of 1879), S. 14—Land subject to S. 74—Razinama of such land need not be registered—Therefore S. 2, T. P. Act, does not apply—Transfer of Property Act (4 of 1882), Ss. 2 and 123—Held further after razinama in favour of another sale is invalid.

A razinama by a khatedar of unalienated lands subject to the provisions of S. 74, Bombay Land Revenue Code, whereby he abandons his rights in favour of another subject to the latter paying the Government revenue, is exempt from registration under S. 90, Registration Act. Therefore nothing provided in the Transfer of Property Act can, by virtue of S. 2 thereof, affect such a relinquishment: *A. I. R. 1917 Eom 287. Dist.* [P 60 C 1; P 61 C 1]

A subsequent sale of the holding by the khatedar to a third party is invalid and inoperative, as no interest is left in the vendor after the kabuliyat which is capable of passing by a sale. [P 60 C 2]

G. K. Parekh—for Appellant.

T. R. Desai—for Respondent.

Scott, C. J.—The facts of this case are shortly that one Chatur, being the registered khatedar of certain unalienated lands which were subject to the provisions of the Land Revenue Code, executed a razinama in the year 1904, in which he stated to the mamlatdar that he had relinquished the khata of the survey numbers in favour of *Desaibhai Gokulbhai*, and requested that the necessary mutation of names should be made in the records. *Desaibhai Gokalbhai*, on the same day, namely, 11th August 1904, executed a kabuliyat to the mamlatdar undertaking to pay the land revenue that might become due from time to time in respect of that khata, and prayed that his name might be entered in the Government records as the registered khatedar. The lower appellate Court has found that Chatur intended to abandon all his interest in favour of *Desaibhai*, and that that was his intention in passing the razinama. Notwithstanding

these transactions, Chatur, in 1911, purported to sell the same property to the plaintiffs by a registered sale-deed, and the plaintiffs filed this suit for the purpose of obtaining possession from Desaibhai. The plaint alleged that Chatur effected a mutation of names in favour of the defendant Desaibhai Gokalbhai to enable the latter to manage, and that Desaibhai's occupation was merely that of a manager on behalf of Chatur. That case however has not been made out in the lower Courts, and the facts found are, as already stated, that there was an abandonment by Chatur in favour of Desaibhai with the intention of Desaibhai becoming the owner of the property.

It is contended on behalf of the appellants-plaintiffs that Desaibhai could not acquire the interest of Chatur in the property except by registered sale-deed, that the effect of the findings is a gift of immovable property by Chatur to Desaibhai, since the application of the Transfer of Property Act to this Presidency, and that therefore under S. 123 a registered document is essential. We have however to consider what is the legal effect of a rajinama on the occupancy holding of a person who has not created any equitable interests in any third party, for in this case we have no valid equitable interest created in any third party by way of mortgage or otherwise so far as the evidence shows. The relinquishment is an abandonment by the khatedar of his claim to hold the property, subject to the payment of the revenue, and therefore prima facie his interest is extinguished. That view obtains support from the fact that relinquishments under S. 74, Land Revenue Code, are expressly mentioned in the Registration Act, S. 90, whereby they are exempt from registration. Why is it necessary that they should be specifically exempt from registration unless they are or may be under certain circumstances obnoxious to the provisions of S. 17, Registration Act? They are, we think, specifically exempt from registration because prima facie they extinguish the right of the relinquishing khatedar to hold the occupancy as against Government, subject to the payment of the revenue. Of course it may often be that equitable interests are reserved by the relinquishing khatedar by

arrangement with the incoming khatedar who takes his place, for example as was suggested in the plaint filed in this suit in order that Desaibhai might come in as manager, mutation of names being effected purely for the purpose of convenience.

That is always a possibility. But the facts found in this case preclude us from holding that that is the true view of the relations of the parties, Chatur on the one hand and Desibhai on the other. We take it, then, that the relinquishment was, and was intended to be an extinguishment of the interest of Chatur in these survey numbers, and the effect of the kabuliyat was that Desaibhai came in by agreement with Government as an occupant in his own right. That being so, how can Chatur retain any interest which is capable of transfer in 1911? It appears to us that the plaintiff got nothing by his sale deed, since Chatur had no interest left which he could transfer. This decision does not conflict with that lately pronounced by a Bench of this Court in *Sakharam Keshav v. Ramchandra Ganesh* (1) for there the abandoning khatedar had already created a mortgage in favour of the defendant, and his abandonment was intended to operate as a transfer by way of sale to that defendant. The defendant pleaded it in answer to a claim by the khatedar to redeem, but it was held that there had been no abandonment to Government of an unencumbered property. Therefore if the mortgage subsisted the right of redemption still subsisted, inasmuch as it had not been sold in the manner provided by the Transfer of Property Act. That is the explanation of that decision and it in no way conflicts with the decision in this case. We therefore affirm the decree and dismiss the appeal with costs.

Heaton, J.—I agree that the appeal in this case must be dismissed. As has been shown, and it is perfectly plain, if the rajinama of 1914 did operate as a relinquishment of Chatur's rights in this property, then neither he nor plaintiffs 1 and 2, who are subsequent assignees from him, can recover anything; for all the rights they seek to recover were parted with in 1904. The method of relinquishment adopted in 1904 was that provided by S. 74, Land Revenue Code,

made more easy of accomplishment by the provision of S. 90, Registration Act, which exempts such rajinamas from registration. It is a particular method provided by law for the relinquishment of an occupancy, namely, the giving up, the annihilation in fact, so far as the occupant is concerned, of his occupancy rights. Therefore it seems to me, in virtue of Cl. (a), S. 2, T. P. Act, nothing provided in that Act can affect a relinquishment made in this way. That is sufficient for our decision in this appeal, and it is not desirable to say anything on the more difficult questions that would arise if we had to consider the total effect of rajinama and kabuliyat taken together, instead of having, as here, to consider only the effect of the rajinama.

G.P./R.K.

*Decree affirmed.***A. I. R. 1916 Bombay 61**

SCOTT, C. J. AND HEATON, J.

Ganesh Narayan Khare and others—Appellants.

v.

Gopal Vishnu Apte and others—Respondents.

Second Appeal No. 1017 of 1915, Decided on 28th September 1915, from decision of Asst. Judge, Thana, in Appeal No. 218 of 1914.

(a) Civil P. C. (5 of 1908), O. 21, R. 72—**Failure to obtain leave to bid by decree-holder makes sale voidable if application made within time—It is mere irregularity.**

Disregard of the statutory provision that leave to bid should be obtained by a judgment-creditor is merely an irregularity of practice, and is not a fundamental breach of trust which nullifies the apparent effect of the Court sale. It only makes the sale voidable under O. 21, R. 72, Civil P. C., and an application to set aside the sale on that ground must be made within the period of limitation provided thereof: 23 *Mad* 227 (P C), *Ref.* [P 63 C 1,2]

(b) Civil P. C. (5 of 1908), O. 34, R. 14—**Provisions of S. 99, T. P. Act (Now-repealed) made sale voidable and not void.**

The violation of the provisions of S. 99 (now repealed) of the Transfer of Property Act, in bringing a mortgaged property to sale upon a money-decree unconnected with the mortgage, is an irregularity and does not make the sale a nullity: *A I R* 1915 *All* 70, *Ref.* [P 62 C 2]

(c) Civil P. C. (5 of 1908), O. 21, R. 1—**Recital in sale certificate—Effect of—It affects only judgment-debtor's right and not of others.**

Where a sale certificate recites that the whole property sold is subject to a mortgage and that the defendant's right of redemption is sold, it does not in terms exclude any other existing right to redeem which there may be in some other coparcener of the defendant.

[P 63 C 2]

(d) **Trusts Act (2 of 1882), S. 90—Scope—It does not apply to case where mortgagee purchases equity of redemption for fair price in decree unconnected with mortgage.**

The provisions of S. 90, Trusts Act, imposing a trust on a mortgagee, who avails himself of his position to gain an undue advantage over the mortgagor, do not apply to a case where the mortgagee purchases for a fair price the equity of redemption of the mortgagor-defendant, in pursuance of a decree obtained by him in a claim independent of the mortgage: 22 *Bom* 624 and 5 *B L R* 450, *Dist*; 32 *Cal* 296 (P C), *Ref.*

[P 63 C 1]

One V., who held a mortgage of plaintiff 1's property, obtained a decree against the latter on a claim independent of the mortgage. He assigned it to one L. benami. L. attached plaintiff 1's equity of redemption in the mortgage, which was brought to sale and purchased by R for a fair price also benami for V. R. transferred the right to V. Plaintiff 1 and his son, plaintiff 2 sued for redemption of the mortgage on the ground that the sale was void as the decree-holder had not obtained the Court's sanction to bid and that in any event, he was affected by the provisions of S. 90, Trusts Act:

Held: (1) that the failure of defendant to get the Court's leave for purchase was an irregularity and that the objection was not open to plaintiff 1 as he had not applied to set aside the sale; (2) that the provisions of S. 90, Trusts Act, did not apply to the case, as this was not a claim founded on the mortgage but was independent of it and as the defendant purchased for a fair price and could not be said to have taken an unfair advantage of his position as mortgagee; (3) that plaintiff 1 was not, and that plaintiff 2 was, entitled to redeem the mortgage.

[P 63 C 1,2]

*Coyajee and J. R. Gharpure—*for Appellants.

*Pendse and H. B. Gumaste—*for Respondents.

Scott, C. J.—The claim of the plaintiffs in this suit is to redeem and recover the plaint property. They allege that plaintiff 1 (since deceased) mortgaged the property with possession to defendant 1 by a deed dated 7th September 1888, and that the cause of action arose in September 1893. The defendants admit the mortgage, but say that in 1902 the right of redemption was sold in execution of a decree of one Mahadeo Vithal Lagu, and was purchased by one Raghunath Krishna Tilak, from whom it was purchased by defendant 1 on 20th December 1902. The learned trial Judge finds that in 1897 defendant 1 brought a suit against the mortgagor for a claim independent of the mortgage, and obtaining a decree assigned it to Mahadeo Vithal Lagu. Lagu, in execution, attached the equity of redemption in the mortgaged property. The purchaser at the auction sale was Raghunath Krishna

Tilak, and Raghunath in the same year transferred his right to defendant 1. The lower Court finds it proved that the assignment of the decree to Lagu and the purchase by Raghunath Tilak were benami for defendant. The lower Court however held that the purchase by defendant 1 was valid until it was set aside, and not having been set aside in execution proceedings was binding upon the plaintiffs and he allowed the claim for redemption only in respect of the share of plaintiff 2, the son of the original mortgagor.

From the decree an appeal was preferred to the lower appellate Court, and in the memorandum of appeal the finding that the decree was in respect of a claim independent of mortgage was not challenged. The lower appellate Court reversed the decree of the trial Court, and remanded the case for taking accounts on the footing that both mortgagors should be allowed to redeem. The ground of the decision appears to be this: that it being established that defendant 1 who was a mortgagee had purchased the mortgaged property benami, he must have purchased it without leave to bid and therefore the mortgagor could disregard the sale and could redeem. Apparently at the base of this conclusion is the idea that there must have been some fraud, and that fraud would make the sale void and not voidable. In my opinion the conclusion of the lower appellate Court is wrong. It has been argued on behalf of the respondents that the case upon these facts is practically identical with that of *Martand v. Dhondo* (1). As appears however from the judgment in that case and the subsequent case of *Husein v. Shankargiri* it was established that the mortgagee by an improper use of his position had obtained the equity of redemption at an undervalue at a Court sale. That is by no means proved here. The auction proceedings are on the record, which show that the equity of redemption of the property which had been mortgaged for Rs. 475, fetched Rs. 234 gross and Rs. 214 net and that there were thirteen bidders of whom the benamidar for the defendant 1 was the highest. The bid amounted to half the amount for which the property had been mortgaged

and even if we assume that the property was not mortgaged for more than two-thirds of its value, not a very likely assumption in the Deccan, the equity of redemption must be held to have fetched a very good price. There is therefore no reason for treating the case on its facts as on all fours with *Martand v. Dhondo* (1). Even however if it could be so treated that would be no justification for holding that the mortgagor was entitled to treat the sale as a nullity. The decision of the Privy Council in *Khizarajmal v. Daim* (3) shows that where the debt sued for in the suit in which the decree resulting in the judicial sale is passed is not for the mortgage debt, the fact that the mortgagee purchased would not be a reason for holding that the sale was a nullity for want of jurisdiction, but a case of irregularity in procedure only. In this connexion the observations of the Judicial Committee in *Malkarjun v. Narhari* (4) are also very pertinent. It was observed there by Lord Hobhouse in delivering the decision of the Court that "if the sale is a reality at all, it is a reality defensible only in the way pointed out by law."

If the mortgagor's case is rested upon the provisions of S. 99, Transfer of Property Act, before it was amended and transferred into the Civil Procedure Code, the answer is the same. For it has been held in more cases than one that the violation of the provisions of S. 99 in bringing the mortgaged property to sale upon a money-decree unconnected with the mortgage, is an irregularity and does not justify the Court in holding that the sale is a nullity: see *Lal Bahadur Singh v. Abharam Singh* (5). But then it has been contended that the mortgagee is merely a trustee for the mortgagor, because he is held to have purchased without the leave of the Court. But if the mortgagee is purchasing not under a mortgage sale of which he has the conduct, as would be the case under a power of sale contained in an English mortgage, then the prohibition upon purchasing is only to be found in the Civil Procedure Code, O. 21, R. 72, which is a reproduction of S. 294 appearing first in the Code of 1877. The learned counsel

1. (1898) 22 Bom 624.

2. (1898) 23 Bom 119.

3. (1905) 32 Cal 296=32 I A 23 (P C).

4. (1901) 25 Bom 337=27 I A 216 (P C).

5. A I R 1915 All 70=27 I C 795=27 All 165.

for the respondents sought to base his case upon the decision of Macpherson, J., in *Kamini Debi v. Ramlochan Sirkar* (6) in 1870. But that was a case where a simple money-decree had been obtained for money which was secured by the mortgage. It was therefore not a case of a decree for a claim independent of the mortgage, as it is here and the learned Judge in that case thought he was justified in applying the rule to be deduced from the English cases relating to sales where the seller has the conduct of the sale such as sales under mortgages by mortgagees.

With regard to purchases by judgment-creditors without leave of the Court, Lord Hobhouse delivering the decision of the Judicial Committee in *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (7) made the following observations in connexion with another Calcutta case of *Sheonath Doss v. Janki Prosad Singh* (8). He said:

"In this case the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid; indeed, it laid down such conditions as would make the granting of leave a very rare thing instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale. Doubtless the conduct of the sale gives opportunities for influencing its course one way or another which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale."

In view of these considerations it is difficult if not impossible to apply the provisions of S. 90, Trusts Act, to the holder of a simple money-decree not based upon a mortgage. It is not a rule of universal application that a judgment-creditor should not bid at a sale under his decree, for example under S. 173, Ben. Ten. Act of 1885, the judgment-creditor is expressly authorised to bid. It appears to me that disregard of the statutory provision that leave to bid should be obtained by a judgment-creditor is merely an irregularity of practice and is not a fundamental breach of trust which nullifies the apparent effect of the Court sale. It only makes

the sale voidable according to the provisions of the rule of the Civil Procedure Code. But the application to set aside the sale upon that ground must be made within the period of limitation and that has not been done here.

The question remaining to be decided is what was in fact sold by the Court in 1902. That is substantially a question of fact depending upon the evidence of the documents in the execution proceeding and it can only be treated as a question of law arising for disposal in second appeal on the basis of its involving the construction of the sale certificate. In our opinion the sale-certificate is not free from ambiguity. It states that the whole property has been mortgaged by the defendant and that the defendant's right of redemption is sold. That does not in terms exclude any other existing right to redeem which there may have been in some other co-parcener. We are therefore not prepared to hold that the learned Judge of the trial Court was wrong in the conclusion he came to, that plaintiff 2's share in the equity of redemption remained unaffected. We set aside the decree of the lower appellate Court and restore that of the trial Court. As to costs we think that each party should bear his own costs of this appeal but that the costs in the lower appellate Court should be borne by the present respondents. With regard to other costs, they are provided for in the judgment of the trial Court.

Heaton, J.—I entirely agree that the sale of the equity of redemption which took place in 1902 cannot be treated as non-existent. It never was set aside in the way provided by law either by application or by suit. The Judge of first appeal recognizes this, but he regarded the case as one, at least this is how I read his judgment, in which the mortgagee in the peculiar circumstances of the case had bought not for himself but as trustee for the mortgagor. He regarded the sale therefore as a perfectly good sale but one under which the interest really belonged to the mortgagor and not to the mortgagee. He based this conclusion on the case of *Martand v. Dhondc* (1), but he did not find all the facts to exist which would enable the reasoning in *Martand v. Dhondc* (1) to apply. If a case of the kind considered in *Martand v. Dhondc*

—6. (1870) 5 B L R 450.

7. (1900) 23 Mad 227=27 I A 17 (P C).

8. (1889) 16 Cal 132.

(1) arose now we should, I apprehend, have to apply S. 90, Trusts Act, and the first thing to do would be to find whether facts existed which made S. 90, Trusts Act, applicable. Such facts are not stated in the judgment of the Judge of first appeal nor do they appear to exist. It seems to me therefore that the decision of that Judge is wrong. But supposing there had in truth appeared facts which did bring the case within S. 89, Trusts Act, then in my opinion the decision might perhaps have been different, though I do not wish to express a positive opinion upon that point for it is unnecessary to do so.

G.P./R.K.

*Decree set aside.***A. I. R. 1916 Bombay 64 (1)**

SCOTT, C. J. AND HEATON, J.

Emperor

v.

Rachapa Gurappa Hattarvat — Accused.

Criminal Appeal No. 113 of 1916, Decided on 5th June 1916, from an order of acquittal passed by First Class Mag., Bail-Hongal.

Explosives Act (1884), Rules under Rr. 3 and 35—Clove crackers are toy fireworks and do not require license for possession.

Clove-crackers or lavangi-crackers are "toy fire-works" within the meaning of R. 3, issued under the Explosives Act, and are therefore exempt from R. 35, imposing the necessity of a license for possessing them. [P 64 C 2]

*S. S. Patkar—for the Crown.**Velinkar and P. B. Shingne—for Accused.*

Judgment.—This is an appeal by the Government of Bombay against an order of the First Class Magistrate of Bail-Hongal, who discharged the accused after investigation of a charge of possessing 2,300 lbs of crackers under the Indian Explosives Act, whereas his license only entitled him to possess 200 lbs. The accused imported Chinese crackers of various kinds, and the 2,300 lbs with which we are now concerned are entirely crackers spoken of in the evidence as lavangi crackers or pata-khas, that is to say, clove-shaped crackers. They are strings of very small sticks hardly longer than a clove, each of which, when ignited, emits a small report. The Governor-General-in-Council has issued rules under the Explosives Act, under S. 35 of which an explosive shall not be possessed except

under and in accordance with the conditions of the license granted under the rules. It is provided however by R. 3 that nothing in the rules shall apply to the possession of toy fire-works such as paper caps for toy pistols.

The first question we have to determine is whether the clove-crackers in question are explosives. The definition of "explosives" requires that they should be either for a practical explosive effect or be used to give a pyrotechnic effect. There can be no question, we think, that the crackers in question have no practical explosive effect. They may however be fire-works intended to produce a pyrotechnic effect, if that term is used in its broadest possible sense, although the light produced from the explosion of one of these crackers is momentary. But assuming for the purpose of argument without deciding that they might be treated as fire-works falling within R. 5, Cl. 7, of the statutory definition, we think that they should be treated as "toy fire-works" within the rule just mentioned. As such they will be exempt from R. 35 imposing the necessity of a license. We therefore think that the learned Magistrate came to the right conclusion. We may observe that there is no technical evidence whatever as to these fire-works, and the only knowledge of their effect which we have been able to obtain has been from the ignition of one of them in Court during the progress of the arguments. We dismiss the appeal.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1916 Bombay 64 (2)**

BATCHELOR AND SHAH, JJ.

Jaya Madhav Kalavant — Appellant.

v.

Manjunath Tai Chandu—Respondent.

Second Appeal No. 238 of 1915, Decided on 19th June 1916, from decision of Dist. Judge, Canara, in Appeal No. 208 of 1913.

Hindu Law—Succession—Dancing girl—Daughters are preferred to sons.

In the case of a naikin or prostitute dancing girl, daughters are preferential heirs over sons: 5 M H C R 161, *Rel. on.* [P 65 C 1]

*G. S. Mulgaokar—for Appellant.**S. V. Palekar—for Respondent.*

Judgment.—The question here is as to the inheritance to the property of a naikin or prostitute dancing girl. The competition is between the daughter

and the son, and the learned District Judge has held that the daughter is the sole heir. Mr Mulgaokar, who appears for the son, has referred us to numerous decisions of the High Courts. But the only decision which is strictly in point is that of *Kamakshi v. Nagarathnam* (1) and there the learned Judges in a similar case held that the daughters are preferential heirs over the sons. The books have been searched on both sides, but neither learned pleader is able to point to any decision of any High Court in which the ruling in *Kamakshi's* case (1) has been differed from or questioned. This ruling is in accordance with the observation in *Steele's Laws and Customs of Hindu Castes*, at p. 181, where we read:

"Children of dancing girls are of their mother's caste . . . Daughters inherit the mother's property in preference to sons."

We are the more ready to give effect to this opinion in the present case because it comes from the district of Canara, and at p. 89, S. 361, of *Strange's Manual of Hindu Law* as prevailing in the Presidency of Madras, it is stated that

"the property of a dancing girl will pass to her female issue first and then to her male, as in the case of other females."

Now at the time *Strange's Manual* was published, what is now the Bombay District of Canara formed part of the Madras Presidency and there is no reason to doubt that the customs incident to naikins in the Canara District are indistinguishable from those observed by similar classes further south. On the whole, therefore the present state of the law is in favour of the view taken by the learned District Judge whose decree must be confirmed with costs, this appeal being dismissed.

G.P./R.K. *Appeal dismissed.*

1. (1869-70) 5 M H C R 161.

A. I. R. 1916 Bombay 65

BATCHELOR AND SHAH, JJ.

Parshottam Veribhai and others—Defendants—Appellants.

v.

Chhatrasangji Madhavsangji Thakor—Plaintiff—Respondent.

Second Appeal No. 1128 of 1915, Decided on 18th December 1916, from decision of Dist. Judge, Ahmedabad, in Appeal No. 127 of 1914.

1916 B/9 & 10

(a) *Contract Act* (9 of 1872), S 65—Scope—S. 65 does not apply to mortgage valid when made and till lifetime of mortgagor.

Section 65, *Contract Act*, has no application to a case of transfer of property by way of mortgage, where the transfer is perfectly valid when made and remains valid for a certain period of time fixed by the law, i. e., the lifetime of the mortgagor. [P 65 C; 2 P 66 C 1]

(b) *Transfer of Property Act* (4 of 1882), Ss. 58 and 62—Mortgage valid upto lifetime of mortgagor by virtue of S. 28 of Act 21 of 1881—Mortgagee cannot recover money advanced—*Broach and Kaira Incumbered Estates Act* (21 of 1881), S. 28.

Where a mortgage effected by a talukdar becomes void under S. 28, *Broach and Kaira Incumbered Estates Act*, 1881 after the death of the talukdar, the mortgagee is not entitled to recover back the money advanced by him on the mortgage : 39 *Bom. 358, Dist.*

[P 66 C 2]

G. N. Thakor—for Appellants.

N. K. Mehta—for Respondent.

Batchelor, J.—The suit out of which this appeal arises was brought by the plaintiff for a declaration that a deed of mortgage made in March 1894, by his father is null and void. The plaintiff also sought to recover possession of the property. The plaint stated that the plaintiff is, and his father was, a talukdar of Kherda, and the mortgage-deed was void under S. 28, *Broach and Kaira Incumbered Estates Act* 21, of 1881 after the death of the mortgagor, the plaintiff's father. The defendants are the representatives of the original mortgagee. The lower appellate Court has decided in favour of the plaintiff upon the main contention, and nothing has been said in the argument before us to lead us to doubt the accuracy of that conclusion. Under S. 28, Act 21 of 1881, it is provided that in circumstances such as we have here no mortgage shall be valid as to any time beyond the natural life of the mortgagor talukdar.

Mr. Thakor however on behalf of the defendants, has contended that they are entitled to recover back the money advanced by them on the mortgage and that until this restitution is made to them, the plaintiff has no right to recover possession of the property. The learned pleader has relied in the first instance upon S. 65, *Contract Act*. That section however in my judgment is of no application. For the case before us is not a case where an agreement is discovered to be void or where a contract became void. The present is a case rather of a transfer of property by way

of mortgage, the transfer being perfectly valid when made and remaining valid for a certain period of time fixed by the law, i. e., the lifetime of the mortgagor. Then the learned pleader called in aid of his contention this Court's decision in *Javerbhai Jorabhai v. Gordhan Narsi* (1). That case must however as I think, be distinguished. It was a case under the Bhagdari Act 1862, and the consideration for the mortgage failed ab initio. In those circumstances the Court held that it was open to the plaintiff mortgagees to recover under the covenant, which provided that if there should be any hindrance or obstruction concerning the house, the defendants and their property, their heirs and representatives would be liable for any loss which the plaintiffs might suffer and for the moneys which the plaintiffs had advanced. In other words, in that case, since the mortgage was void from the beginning, the event contemplated in the covenant had in fact happened, and the plaintiffs were entitled to take advantage of that happening. The covenant in the present case is in form very like that in *Javerbhai's* case (1). It runs in these words :

"If any manner of obstruction or hindrance be caused or any claim or right be preferred as regards this land, I personally, my heirs and representatives and children are to be answerable for your amount in respect of the mortgage."

But it seems to me impossible to say here that the event contemplated in the covenant has in fact happened. For the defendants actually obtained possession of the mortgaged property and retained possession of it until the death of the mortgagor, i. e., for a total period of about nineteen years. Now the parties to this mortgage and this covenant must, I think, be taken to have contracted with reference to the existing law, and the covenant must be read as limited to the time during which the mortgage remained valid under that law. During all that time, as I have said, there was no hindrance or obstruction or any other circumstance which could call the terms of the covenant into operation. It is true that the defendants' term of possession has been shorter than it would have been if the law had been otherwise. But I cannot see how the defendants can lawfully complain of that.

They must in my view be regarded as having taken their chance as to the length of their possession. As the learned District Judge observes :

"Presumably the mortgagor and mortgagee knew how they stood, and I suppose the mortgagee took proper care of his interests in view of the unsatisfactory nature of his security."

I am of opinion, for these reasons, that the contract between the parties has effectually been carried out, subject to the law of the country according to which they must be taken to have contracted. It follows therefore that the defendants are not entitled to any money compensation for handing over possession to the plaintiff. The appeal therefore in my opinion fails and should be dismissed with costs.

Shah, J.—I am of the same opinion.
G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 66

BATCHELOR AND SHAH, JJ.

Mohanlal Nagji — Plaintiff — Petitioner.

v.

Bai Kashi—Defendant—Opponent.

Civil Application No. 483 of 1915, Decided on 2nd February 1916.

Civil P. C. (1908), S 110—Suit for injunction and declaration—Subject-matter of suit—Value of, exceeding pecuniary jurisdiction—Suit lies in Second Class Subordinate Judge's Court—No representation as to real value is made.

In the Bombay Presidency it is open to a plaintiff to sue in a Second Class Subordinate Judge's Court for a declaration and injunction, even though the immovable property referred to or affected by the injunction exceeds the pecuniary limit of that Judge, i. e., Rs. 5,000.

Therefore, a plaintiff by suing for a declaration and injunction in a Second Class Subordinate Judge's Court makes neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allows him to do, he places upon the relief which he is seeking: 21 I C 783, *Appl.* [P 68 C 1]

Setalvad and *N. K. Mehta*—for Petitioner.

Jayakar and *G. N. Thakor*—for Opponent.

Batchelor, J.—This is an application for leave to appeal to the Privy Council the applicant being the original plaintiff in the suit. The suit was filed for a declaration that the plaintiff was the adopted son of one Nagji Vithal and for an injunction restraining interference by the defendant. The suit was originally

1. (1915) 39 Bom 358=28 I C 442.

instituted in the Court of the First Class Subordinate Judge at Broach. It so happened that he was the only Subordinate Judge then at Broach, and by him the suit was transferred for hearing to the Second Class Subordinate Judge. It was contended by Mr. Jayakar that as the trial before the Second Class Subordinate Judge was acquiesced in by the plaintiff, the result is the same as if the suit had been filed in the Court of the Second Class Subordinate Judge. That position has not been contested, and I will assume for the purposes of my judgment that this part of Mr. Jayakar's argument is unassailable. The trial Court found in favour of the plaintiff and that decree was confirmed on appeal by the learned District Judge. But in the appeal to the High Court, which was heard by my learned brother Shah and myself, we came to another conclusion, being satisfied that there had been the exercise of undue influence by the plaintiff. Therefore we reversed the decision of the lower Court and dismissed the plaintiff's suit. From that decree the plaintiff now seeks to go in appeal to the Privy Council.

The suit as instituted by the plaintiff was valued by him at the sum of Rs. 135, and this present application is met at the outset by the objection that the plaintiff cannot now be heard to say that, within the language of S. 110, Civil P. C., the amount or value of the subject matter in dispute on appeal is Rs. 10,000 or upwards. The argument is that since the plaintiff himself elected to value his suit at only Rs. 135 and conducted it in the Court of the Subordinate Judge, the limit of whose pecuniary jurisdiction was Rs. 5,000, he cannot now contend that the subject-matter of the suit is worth Rs. 10,000. It is urged in support of this argument that the word "subject-matter" occurring in S. 110, Civil P. C., must be used in the same sense which the expression bears in S. 24, Bombay Civil Courts Act. This argument is based upon the decision of the Chief Justice and Beaman, J., in *Hirjibhai v. Jamshedji* (1). That was a suit brought in the Court of the Second Class Subordinate Judge for taking accounts, and the claim was valued at Rs. 101 for the purposes of court-fees and jurisdiction. The plaintiff however

in applying for leave to appeal to the Privy Council, alleged that the amount or value of the subject-matter of his suit was far in excess of Rs. 10,000. The Court decided against him, and the scope of the decision is stated very clearly towards the end of Beaman J's. judgment, where we read :

"We are therefore very clearly of opinion that the proposition we began by stating is correct, and has been supported by good reasoning in the case of *Golap Sundari v. Indra Kumar Hazra* (2). That proposition is that the amount or value of the subject-matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted. It follows that the amount or value of the subject-matter of a suit, for the purposes of S. 109, Cls. (a) and (b), and S. 110, Civil P. C., if that suit is instituted in a Court the pecuniary limit of whose jurisdiction is Rs. 5,000, can never be greater than Rs. 5,000."

Though the facts of the present case are in some respects different from those of the application before the Chief Justice and Beaman, J., notably in this respect that whereas that was a suit for accounts this was merely a suit for an injunction and declaration, yet I am not prepared to hold that the present application can be taken out of the scope of the decision in *Hirjibhai v. Jamshedji* (1), in so far as that decision interprets the words occurring in para 1, S. 110, Civil P. C.—I mean the words "the amount or value of the subject-matter in dispute on appeal to His Majesty in Council." But even supposing that Mr. Jayakar is successful in bringing this part of his application within the ambit of the decision which I have quoted, it remains to consider whether the petitioner is not entitled to obtain leave to appeal under para. 2, S. 110. For the section enacts that a petitioner is so entitled if, in the circumstances which are now before us, the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value. For the purposes of the present argument we are assuming that the property affected by our decree exceeds in value the sum of Rs. 10,000. And the argument which we have to consider is, whether upon that assumption there is anything in the past conduct of the present petitioner which should, as by a species of an estoppel, debar him from asserting and proving, if he can, that such is the value

1. (1913) 21 I C 783.

2. (1909) 1 I C 86.

of the property affected. In my opinion there is nothing which should debar him. And in this respect the application is, I think, clearly distinguishable from the facts which were before the Court in *Hirjibhai's* case (1). That, as I have said, was a suit for accounts, and the plaintiff elected as his forum the Court of a Subordinate Judge whose pecuniary jurisdiction was limited to Rs. 5,000. The Court therefore, for reasons which may readily be appreciated, held the plaintiff bound by this action of his to acquiescence in the statement that the value of the subject-matter of his suit could not exceed Rs. 5,000. Here however our facts are otherwise.

The suit was, as I have said, brought only for an injunction and a declaration. By a series of decisions of this Court, which are at present binding upon us and of which I need notice only the case of *Vachhanni Keshabai v. Vachhani Nanbha* (3), it is the law in this Presidency that it is open to a plaintiff to sue in a Second Class Subordinate Judge's Court for a declaration and injunction even though the immovable property referred to or affected by the injunction exceeds the pecuniary limit, i. e., Rupees 5,000 of the Second Class Subordinate Judge's jurisdiction. That being so, the plaintiff in this case by suing in the Second Class Subordinate Judge's Court seems to have made neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the relief which he was seeking. Admittedly, the decision in *Hirjibhai v. Jamshedji* (1) proceeds upon the reasoning that a plaintiff should not be allowed to put inconsistent values upon the subject-matter of his claims at different times according to the shifting character of his interests. But if I am right in what I have already said, it will be clear that this reasoning cannot affect the present plaintiff, for the merely fiscal valuation which he put upon the injunction and declaration which he sought is wholly independent of the real or market value of the immovable properties. I am consequently of opinion that the decision in *Hirjibhai v. Jamshedji* (1) cannot be invoked so as to shut out the

present plaintiff from appealing to the Privy Council, if he succeeds in proving that the condition described in para. 2, S. 110, is in his case satisfied; that is to say, if he can succeed in proving that the decree or final order must involve directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000.

In my opinion therefore he must have an opportunity of proving that that is the value of the property. As the affidavits which have been put in on both sides with reference to the question as to the value of the property are in direct conflict, we think it desirable to act under the powers given to us by O. 45, R. 5 of the Code. Under that rule therefore we refer to the Court of first instance the dispute as to the amount or value of the property which must be involved directly or indirectly by the decree or final order in this appeal. It is conceded that the Sutarel property is no part of the property in suit, which is concerned only with the property at Derol. The Court of first instance will take evidence and report on the question referred to it.

Shah, J.—I entirely agree.

G.P./R.K.

Dispute remitted.

A. I. R. 1916 Bombay 68

BATCHELOR AND SHAH, JJ.

Laxmipatirao Shrinivas Deshpande—
Defendant—Appellant.

v.

Venkatesh Tirmal Deshpande and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 339 of 1911, Decided on 21st July 1916, against decision Dist. Judge, Dharwar, in Appeal No. 233 of 1908.

(a) Hindu Law—Adoption—Severance with family of birth—Except for purpose of marriage all relationship is severed by adoption.

Though natural relationship is recognized for the purpose of prohibiting marriages within certain degrees of relationship, there is an entire cessation of the connexion of an adopted boy with the natural father's family after adoption.

[P 71 C 1]

(b) Hindu Law—Adoption—Dvyamushyayana — Requirements — Only son can be adopted in this form—Agreement must be proved as fact—Except for the agreement this form does not differ from "kevala."

In the nitya dvyamushyayana form of adoption, a stipulation that the adopted boy is the son of both the adopter and the natural father is necessary, even where the adoption is of the

only son of a brother, and the agreement must be proved like any other question of fact.

[P 73 C 1; P 75 C 2]

Such a stipulation forms the distinguishing feature of a *dvyamushyayana* adoption, there being no other difference in the ceremony between *kevala* and *dvyamushyayana* adoptions: 21 *All* 460; 22 *Mad* 398; 3 *Cal* 587 (P C); 12 *W R* 29 (P C); (1849-1853) 1 *M S D A* 234 and 19 *Bom* 428, *Dist.* [P 73 C 1]

(c) **Hindu Law — Adoption — Form — Presumption—Adoption of only son of brother—*Dvyamushyayana* form cannot be presumed.**

There is no presumption of law that the only son of a brother, if given in adoption, must be deemed to be given as a *dvyamushyayana* son.

[P 75 C 2]

Jayakar and Nilkanth Atmaram—for Appellant.

H. C. Coyaji, G. P. Murdeshwar, Y. N. Nadkarni and K. H. Kelkar—for Respondents.

Shah, J.—It is necessary in this case to state briefly the facts out of which the present second appeal arises. One Venkappa had four sons, Melgirappa, Konappa, Ramappa and Gurappa. These four brothers were divided many years ago. Ramappa, the third son of Venkappa, had a son Hanmappa; and the fourth son, Gurappa, had two sons, one of whom was Kristappa. Kristappa had two sons Lakshmipatirao and Hanmappa. This Hanmappa was adopted by Ramappa's son Hanmappa. He (the adopted son of Hanmappa) had a son Shrinivasrao, and two daughters by his first wife Gangabai, and one daughter by his second wife, also named Gangabai. Lakshmipatirao had no male issue and is said to have taken Shrinivasrao in adoption in the year 1846. It is the adoption of Shrinivasrao that is in dispute in this litigation. Lakshmipatirao died in 1846 leaving a widow Lakshmi-bai and the boy Shrinivasrao. Hanmappa, the natural father of Shrinivasrao, died in 1852, leaving a young widow Gangabai (his second wife), and three daughters. His first wife had predeceased him. The surviving widow Gangabai died in 1898. The plaintiff Timappa, who is a great-grandson of Konappa, the second son of Venkappa, filed the present suit in 1902 as a reversioner claiming Hanmappa's estate after Gangabai's death. He joined all the members of the four branches of the family of Venkappa, including Hanmappa's daughters and their sons, as defendants.

Defendants 1 and 2 are the sons of Srinivasrao and are principally in-

terested in contesting the plaintiff's claim. Defendants 3, 4, 5 and 6 are Hanmappa's daughters and their sons. Defendants 7, 8, 9 and 10 represent Melgirappa's branch. Defendants 1 and 12 belong to Gurappa's branch, but to a sub-branch other than that of defendants 1 and 2 and are opposed in interest to defendants 1 and 2. Defendant 13 belongs to Kolappa's branch and is the brother of the plaintiff. The relationship of the parties is given in detail in the genealogical table (Ex. 813) attached to the judgment of the lower appellate Court. The plaintiff's claim relates to the property of Hanmappa who was adopted in Ramappa's branch. The property with which we are concerned is *vatan* property. The plaintiff claims to be entitled to a fifth share in the property and seeks to recover possession thereof with *mesne* profits after partition. His claim is made on the footing that the daughters of Hanmappa cannot inherit the *vatan* property in consequence of the provisions of Bombay Act 5 of 1886, that Shrinivasrao, the natural son of Hanmappa, was given away in adoption to Lakshmipatirao, and that Shrinivasrao's sons, defendants 1 and 2, have been in wrongful possession of the property after Gangabai's death in 1898. It is common ground now that defendants 3 to 6 have no right to the property in question; and it is not necessary to notice the defence made on behalf of some of them in the trial Court. Defendants 7 to 13 sided with the plaintiff, and claimed their respective shares as reversioners in the trial Court.

Defendant 2 did not appear. Defendant 1 contended, among other things, that Hanmappa (Lakshmipatirao's brother) was not adopted by Hanmappa, the son of Ramappa, as alleged by the plaintiff, that Shrinivasrao's adoption by Lakshmipatirao, in 1846, was in the *dvyamushyayana* form, that their father Shrinivasrao, and, after his death in 1885, they had been in adverse possession of the property since 1852, and that the plaintiff's claim was time barred.

The trial Court found that Hanmappa was in fact adopted by Hanmappa, son of Ramappa, that Lakshmipatirao adopted Shrinivasrao in 1846 in the simple form (as a *kevala dattaka*) and not as a *dvyamushyayana* son of himself and Hanmappa, that the property belonged

to Hanmappa at the time of his death and that the claim was not time barred. Accordingly a decree was passed in favour of the plaintiff and other defendants-sharers for partition and possession with mesne profits against defendants 1 and 2 in 1908. In the appeal by defendant 1 to the District Court, the findings of the trial Court were affirmed except as to a part of the property. The lower appellate Court confirmed the decree of the trial Court subject to a variation as to a part of the property in 1911. Defendant 1 preferred the present appeal to this Court in 1911.

As regards respondent 12 (Ramchandrappa), the appeal abates, as no steps have been taken in time by the appellant to bring the legal representatives of Ramchandrappa on the record, who died during the pendency of the appeal. In support of the appeal Mr. Jayakar on behalf of the appellant has urged, firstly, that the adoption of Shrinivasrao by Lakshmipatirao must be presumed to have been in the *dvyamushyayana* form according to Hindu law, unless a stipulation to the effect that it was to be in the simple form was alleged and proved by the plaintiff; secondly, that apart from this presumption the documentary evidence in the case establishes the fact that Shrinivasrao was a *dvyamushyayana* son of Lakshmipatirao and Hanmappa; thirdly, that the plaintiff's claim is barred on account of the property having been in the adverse possession of Shrinivasrao and defendants 1 and 2 since 1852; and, lastly, that no mesne profits should have been allowed to the defendants sharers. It is not disputed now that Hanmappa (brother of Lakshmipatirao) was adopted in Ramappa's branch as alleged by the plaintiff and found by the lower Courts. It will be convenient to deal with the appellant's contentions in the order in which I have stated them.

As regards the first contention, it is based on the argument that according to Hindu law, when the only son of a brother, divided or undivided, is adopted, he becomes a *dvyamushyayana* son of both the brothers, the adopter and the giver, in the absence of a stipulation to the contrary. It is further argued that though Hanmappa became a distant cousin of Lakshmipatirao after his adoption in Ramappa's branch, he still re-

mained the brother of Lakshmipatirao with the result that the above rule of Hindu law would apply to Shrinivasrao's adoption. Mr. Coyaji for the plaintiff has urged that the rule of Hindu law as stated by Mr. Jayakar has no application to the present case as Hanmappa's natural relationship with Lakshmipatirao terminated on his adoption, and that he was related to Lakshmipatirao as a divided and distant cousin, when he gave his only son Shrinivasrao in adoption to Lakshmipatirao. In other words, he maintains that Hanmappa was not Lakshmipatirao's full brother in 1846 when Shrinivasrao was given in adoption. He further contends that there is no such rule of Hindu law as stated by Mr. Jayakar, that a *dvyamushyayana* adoption is the result of a stipulation, that the stipulation must be proved in every case by the person who relies upon such an adoption, including the case of the adoption of an only son of a brother, and that unless the stipulation constituting the boy a *dvyamushyayana* son is proved, the adoption must be held to be in the simple form.

After a careful consideration of the arguments on both sides it seems to me in the first place that Hanmappa cannot be treated as the *nterine* brother of Lakshmipatirao at the date of Shrinivas's adoption in 1846. It is undisputed and indisputable that Hanmappa lost all rights to the property of his natural father on his adoption in Ramappa's branch, that though the *gotra* did not change in this particular case, the degree of relationship was altered for the purposes of inheritance and the obligation to offer oblations underwent a similar change. Manu's verse No. 142 in the ninth *Adhyaya* of his *Smriti*, which is quoted with approval both in the *Mitakshara* and the *Vyavahara Mayukha*, is clear on the point. Mr. Jayakar however, argues that the tie of blood or natural relationship, which is not included in the terms *gotra*, *riktha*, *pinda* or *svadha* used in the above verse, subsists even after the adoption. It is urged that for the purposes of marriage, for instance, the existence of the blood-relationship has to be recognized, and there is no reason why it should not be recognized for the purposes of adoption under such circumstances as we have in the present case. It seems to me how-

ever that the whole argument is opposed to the conclusions in the Vyavahara Mayukha, Dattaka Mimansa and Dattaka Chandrika. It is not suggested that there is anything in the Mitakshara bearing on this point. After referring to the above text of Manu the conclusion is thus stated in the Vyavahara Mayukha:

"Even by the terms gotra (family), pinda (funeral oblation), riktha (heritage) and svadha (shradha, etc.) are to be understood all the acts connected with the pinda or funeral oblation due to the natural father; their extinction is pronounced. From this also follows (as a matter of course) the cessation of family connection with the uterine brother and the father's brother and the rest: see Mandlik's Hindu Law, p. 59."

It is significant that the word "sambhandha" is used in the original text by Nilkantha for the expression "family connection" in the translation. The conclusion is also emphasised later on at p. 61 of the book by referring to the text of Manu as involving "an entire cessation of connection with the natural father and the rest," the expression corresponding to the words "entire cessation of connection" being "sambandh-matrinibritti." Further on in the same chapter with reference to marriage the conclusion is thus stated at p. 61 of Mandlik's Hindu Law:

"Further a marriage in the family of the natural father within seven degrees is altogether illegal according to this text of Gautama; with the paternal bandhus or kinsmen on the progenitor's side up to the seventh degree and with those on the mother's side up to the fifth, etc."

Thus it is clear that the natural relationship is recognized for the purpose of prohibiting marriages within certain degrees of relationship in virtue of an explicit text and opinion based thereon. The conclusions in the Dattaka Mimansa and the Dattaka Chandrika on this point are generally to the same effect: see Dattaka Mimansa, S. 6, paras. 6, 7, 8, 10 and 11, and Dattaka Chandrika, S. 2, paras. 17 and 18—Stokes' Hindu Law Books, pp. 599-600 and 640 respectively. These passages establish clearly that though the natural relationship is recognized for the purpose of prohibiting marriages within certain degrees of relationship, there is an entire cessation of connection of the adopted boy with natural father's family after adoption. It is not necessary in this case to decide—and I am far from deciding—that the disabilities arising from the recognition of natural relationship are confined to

the question of marriage. I have however no hesitation in holding that in spite of the natural relationship which originally subsisted between Lakshmipatirao and Hanmappa, Hanmappa's natural son Shrinivas, born long after Hanmappa's adoption, would belong to Ramappa's branch, and would not be treated as Lakshmipatirao's natural brother's son as if Hanmappa had not been adopted. This conclusion becomes clearer when regard is had to Manu's text (Manu IX, 182) and the opinions based thereon, upon which Mr. Jayakar has relied mainly in connection with his first contention. The opinions expressed in the Mitakshara and the Vyavahara Mayukha in favour of the brother's son are expressly based upon Manu's text (Manu IX, 182), which has been translated as follows:

"If among several brothers of the whole blood, one have a son born, Manu pronounces them all fathers of male issue by means of that son: see Stokes' Hindu Law Books, p. 420—Mitakshara, Ch 1, S. 11, para. 36."

It is quite clear to my mind that no Hindu brother can be pronounced to be a father of male issue within the meaning of this text, if a son is born to his brother, who is already given away in adoption long before the birth of the son. This text can refer only to the case of a son of a brother who is a brother of the whole blood at the time of the birth of the son, and whose connection with the family of his own birth has not ceased on account of adoption; and as pointed out by Vijnaneshvara, "it is not intended to declare him son of his uncle," but "to forbid the adoption of others if a brother's son can possibly be adopted." It follows therefore that the very foundation which is essential for Mr. Jayakar's first contention does not exist in this case. Shrinivasrao, when born, was not Lakshmipatirao's brother's son but his divided and distant cousin's son.

Assuming however in favour of the appellant that Hanmappa, in spite of his adoption in Ramappa's branch, can be treated as Lakshmipatirao's brother of the whole blood at the time of Shrinivasrao's adoption by Lakshmipati, Mr. Jayakar's contention that the adoption must be presumed to be in the dvya-mushyayana form as a matter of law unless a contrary stipulation in favour of a simple adoption is established, can-

not be accepted. I have already set forth the rival contentions of the parties on this point. Mr. Jayakar relies upon the observation in Mayne's Hindu Law (S. 145, p. 185, Edn. 8) that an only son can be adopted as a *dvyamushyayana* either by an express agreement that his relationship to his natural family shall continue or when he is the only son of a brother taken in adoption by another brother, in which case the double relationship appears to be established without any special contract. There are similar observations in other modern books which Mr. Jayakar has referred to: see, for example, Sarkar's Hindu Law, p. 162, Edn. 4, and Tagore Law Lectures for 1888 on Adoption at p. 302. Mr. Mayne has referred to several texts and cases in the foot-note in support of this observation; and it will be necessary to examine them briefly to see whether in Hindu law without proof of an agreement a brother's only son can be held to be a *dvyamushyayana* when adopted by another brother.

Before I do so however it will be appropriate to state Mr. Jayakar's argument briefly, as it may help to restrict the scope of the examination of the texts and other authorities. His argument is that adoptions are of two forms, one simple (*kevala*) and the other *dvyamushyayana*. The *dvyamushyayana* adoptions are of two kinds, *nitya* and *anitya*. According to him the *nitya dvyamushyayana* is the result of a stipulation that the boy shall be the son of both (fathers.) The *anitya dvyamushyayana* is not the result of any agreement, but arises when the ceremony of tonsure has been performed in the natural family of the adopted boy and when the boy belongs originally to a different gotra. This form of *dvyamushyayana*, it is conceded by Mr. Jayakar, is obsolete, and in any case it has no application to the present case. Mr. Jayakar however argues that the case of an only son of a brother is an exception to the general rule that there should be a stipulation in the case of a *nitya dvyamushyayana* adoption, and that in his case it should be presumed to be a *dvyamushyayana* adoption without proof of any stipulation. Thus it is necessary to consider whether such an exception is recognized in any of the texts and decided cases and whether, apart from texts and precedents,

on principle such an exception could be recognized.

As regards the texts the *Mitakshara* is silent on the point. The *dvyamushyayana* son mentioned by *Vijnanesvara* is not the *dvyamushyayana* son which later writers refer to, and admittedly the species of a *dvyamushyayana* son referred to by *Vijnanesvara* is obsolete and has nothing to do with our present point. The *Vyavahara Mayukha* does not refer to any such exception. It lays down that

"*dattaka* or given son is of two sorts: (1) *kevala* (simple) and (2) *dvyamushyayana* son of two fathers. The first is one given without any condition, the second is one given under the condition that son belongs to us both: *Mandlik's Hindu Law*, p. 52."

The word used for condition is *sanvid*. Then after a long discussion about the doubt raised by some that the simple (*kevala*) adopted son does not exist, the conclusion is thus stated at p. 62:

"Thus the simple adopted son and a son of two fathers being established, the *sanvid* or condition (in the case of the *dvyamushyayana*) to the effect that he shall belong to us both is likewise established, because (in the condition there is a visible object, namely, that) the adopter may know him to be the son of both the fathers."

There is no exception to this rule stated anywhere by *Nilkantha* in the chapter on adoption. The rule is stated in unequivocal terms. Mr. Mayne refers to the *Vyavahara Mayukha* in his foot-note, but I am unable to say that the reference supports the conclusion stated there. I attach great importance to the circumstance that the *Vyavahara Mayukha* recognizes no such exception as in point of authority so far as the present point is concerned; the *Vyavahara Mayukha* ranks next to the *Mitakshara*. The *Dattaka Mimansa* also fails to lend any support to the contention. The passages relied upon are s. ii, paras. 37, 38, 44 and s. vi, paras. 34-36 and 47 and 48 (*Stokes' Hindu Law Books*, at pp. 554, 555, 608, 609 and 612). It is really not necessary to examine these passages in detail. They refer to the propriety or even the necessity of adopting the son of a brother, when there is one, even if he be the only son and it is pointed out that the prohibition against the adoption of an only son does not apply to the case of a brother's only son. There is nothing in these passages, so far as I can see, to indicate whether in the opinion of the author in

the case of a brother's only son there is no need for a stipulation or condition. On the contrary in S. vi. para. 41 there is an indication that a nitya dvyamushyayana adoption is the result of the

"stipulation that this is the son of the two (the natural father and the adopter)."

In the Dattaka Chandrika the passages referred to are s. i—27, 28, iii—17 and S. v—33 (Stokes' Hindu Law, pp. 635, 636, 650 and 651 respectively). The passages most favourable to the appellant are paras. 27 and 28 in s. i. No doubt the adoption of a brother's son is directed and the difficulty arising from Vasishtha's text relating to the prohibition against the adoption of an only son is avoided by a reference to dvyamushyayana form of adoption in these terms:

"For the text in question is applicable to a case other than that of the dvyamushyayana, the extinction of the lineage contemplated in the clause of the text containing the reason, would not take place."

There is nothing to show that in the opinion of the author, there is no need for a stipulation in the case of the adoption of the only son of a brother in the dvyamushyayana form. It seems to me that these texts taken as a whole do not support the appellant's contention, but establish that in the dvyamushayana form of adoption a stipulation that the boy is the son of both the adopter and the natural father is necessary. In fact such a stipulation forms the distinguishing feature of a dvyamushyayana adoption, there being no other difference in the ceremony between kevala and dvyamushyayana adoptions. Among the treatises on Hindu law, the passage in Strange's Hindu Law, Vol. 1, p. 86, no doubt appears to be in favour of the appellant. But it mainly rests upon the authority of the Dattaka Chandrika, which I have already dealt with. The passage at p. 107, Vol. 2 of the same work does not touch the point in question. The passages in Steele's Law and Custom of Hindu Castes at pp. 45 and 83 refer to the prohibition to adopt "an only son, a youngest or an eldest son" and to the exception made in favour of a brother's son. But there is nothing therein which throws any light on the present point. Sarvadhikari's Treatise on the Hindu Law of Inheritance contains a reference to the subject of dvy-

mushyayana sons at pp. 533-536. It is stated at p. 535 that:

"if it so happened that the adopted son belonged to the family of the adoptive father—if for instance, he was the son of a brother, then the law regarding a dvyamusnyayana may be called into operation and all its consequences must be strictly adhered to."

The proposition is broadly stated, and it is conceded that it is true, if at all, as regards the brother's son only. But if regard is had to the context, I do not think that it can be accepted as supporting the appellant's contention. The author observes that

"the son of two fathers seldom exists in practice and that there is a tendency to devise means to extinguish the double filial relationship altogether."

The last treatise that I need refer to is Golap Chandra Sharker Sastri's Hindu Law. At p. 162, Edn. 4 of this book, the learned author observes that

"if an only son of one brother be adopted by another brother or his widow, he becomes, by operation of law, the son of two fathers an express stipulation being unnecessary."

The only authority cited in support of this view is the case of *Krishna v. Paramshri* (1). But this case only decides that the power of giving and taking on only son in adoption in the dvyamushyayana form is not confined to brothers, but may also be exercised by their widows. There is no other authority cited in support of the proposition. I may here mention that the same learned author refers to the Mitakshara. C. I., s. x, paras. 1 to 3, in support of a somewhat similar remark in his book on adoption (Tagore Law Lectures for 1888). But the dvyamushyayana son mentioned by Vijnanesvara in this part of his commentary is quite different from the dvyamushyayana son we are dealing with. The dvyamushyayana son in the sense of the Mitakshara is obsolete now. It is also significant that at p. 376 in the same book his observations about the nitya dvyamushyayana and anitya dvyamushyayana show that in the former there must be a stipulation to that effect. The result is that there are observations in some of these books, which support the appellant's contention. But in this Presidency we have to be guided mainly by the Mitakshara and the Vyavahara Mayukha supplemented by the Dattaka Mimamsa and the Dattaka Chandrika.

1. (1901) 25 Bom 537.

These learned authors do not deal with the Vyavahara Mayukha at all, and so far as they refer to the Dattaka Mimansa and Dattaka Chandrika, I am of opinion that they are not supported by them. But above all there is no precedent in favour of their view from this Presidency and it seems to me that it is not safe to accept their opinion on this point so far as Western India is concerned where by far the common form of adoption is the simple (kevala) form, and not the dvyamushyayana form. It is pertinent to note here that the view as to the prohibition against the adoption of an only son in this Presidency, which is to a large extent connected with the present point, has been somewhat different from that which obtained in other Presidencies until their Lordships of the Privy Council pronounced in favour of the validity of the adoption of an only son in 1899: see *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (2). This consideration also affords a reason for not accepting too readily the opinions on this point expressed in these books on Hindu law.

I now come to the decided cases, which Mr. Mayne refers to and some of which have been referred to in the course of the argument. The most important is the case of *Wooma Dae v. Gokulanund Dass* (3). Their Lordships, after referring to certain passages in the Dattaka Mimansa and Dattaka Chandrika, concede that "they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other persons as a dvyamushyayana, or son of two fathers."

The point that was decided was that the directions contained in these texts were not mandatory and that an adoption, though not in conformity with them, was valid. So far it seems to me that their Lordships do not consider or decide the point which we have to decide in this case. But further on their Lordships observe as follows:

— "Again, to constitute a dvyamushayayana there must be a special agreement between the

two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William MacNaghten at p. 71 of his Principles and Precedents."

The passage at p. 71 of the book shows that a dvyamushyayana adoption "may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed nitya dvyamushyayana; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated anitya dvyamushyayana."

Thus the observations of their Lordships of the Privy Council, instead of favouring the appellant's contention, favour the view that a nitya dvyamushyayana adoption can take place only by special agreement to that effect. No exception to this rule is mentioned either in the judgment or in Sir William Macnaghten's Principles and Precedents, apart from anitya dvyamushyayana adoption which stands on a different footing altogether. The other case is the case of *Nilmadhub Doss v. Bishumber Doss* (4). The question that their Lordships had to decide was, as observed at p. 97 of the report, whether the respondents in the case had established that there was in fact an adoption of Ramlochan Dass by Gooroooprasad Dass. On a consideration of the evidence their Lordships held against the respondents. The question to be considered was purely one of fact, and the presumptions referred to at pp. 100 and 101 of the report are presumptions of fact and not of law. The presumption that no sonless Hindu will fail to adopt a son or to make provision for an adoption is not strong, and the other presumption that he would not break the law by giving in adoption an eldest or only son or allowing him to be adopted otherwise than as a dvyamushyayana or son to both his uncle and his natural father referred to in contrast with the first cannot be treated as much stronger than the first. These observations must be taken with reference to the context and cannot be properly taken out of their context and treated as propositions of law. Their Lordships have decided in the case already referred to that these rules of law are not mandatory but merely directory. It may be that in appreciating evidence as to the fact of a particular adoption, the Court may be satisfied with less proof in the case of an eldest or only son of a brother than in any other case in deciding whe-

2. (1899) 21 All 460=22 Mad 398=26 I A 113 (P C).

3. (1877-78) 3 Cal 587=5 I A 40 (PC).

4. (1869) 12 W R 29=13 M I A 85 (P C).

ther that adoption was in the *dvyamushyayana* form or not. But the case cannot be treated as deciding that as a matter of law there can be a *dvyamushyayana* adoption without a stipulation or condition to that effect between the giver and the adopter, when both of them are brothers and when the boy happens to be the only son of the giver.

The other cases referred to by Mr. Mayne do not carry the point any further and need not be discussed. It will be enough to state that the decision in *Permaul Naicken v. Pottee Ammai* (5) is based upon the remark in Strange's *Hindu Law*, Vol. I, p. 86, which I have already dealt with. There is no decision of this Court bearing on this point. Certain observations of Ranade, J., in the case of *Basava v. Lingangavda* (6) have been relied upon. But I feel quite clear on a consideration of these observations that they do not touch the point in question; and that there was no occasion then to consider the present point. It is significant that Ranade, J., refers to this form of adoption as having become generally, if not altogether, obsolete in this Presidency. The result of all these decisions taken together seems to me to support the conclusion that a *nitya dvyamushyayana* adoption is always the result of an agreement to that effect, and that there is no exception to the rule.

If we consider the question apart from texts and precedents, it is clear that there is really no foundation for the appellant's contention. The theory is that according to certain texts of Hindu law the adoption of an only son is absolutely prohibited. How is the adoption of a brother's only son, who would naturally and obviously be the most suitable boy to adopt, if he were otherwise eligible, to be justified? The only way that the commentators could suggest was the one which in fact they did suggest, viz., that the adoption could be in the *dvyamushyayana* form. But the supposed prohibition of the adoption of an only boy no longer exists. Therefore there is nothing to be avoided while giving an only son, or even an only son of a brother, in adoption. Besides, the direction as to adopting a brother's son in preference to any other boy has been

held long since to be a recommendation and not an imperative command; and there is no reason to suppose that the direction as to adopting a brother's son has been ever treated in this Presidency as anything more than a recommendation. Under these circumstances there would be no ground for presuming that the only son of a brother, if given in adoption, must be deemed to be given as a *dvyamushyayana* son. It is open to that brother to give his only son in adoption to a stranger if he chooses. It is equally open to him to give him to his own brother, if so minded. The pressure upon his conscience, if any, would be much the same in either case from the point of view of Hindu sentiment. If there is need to prove an agreement to support the plea of *dvyamushyayana* form of adoption in one case, there is, in my opinion, equal need for proof of such an agreement in the other cases. On a careful consideration of all the arguments for and against this point I have come to the conclusion that in every case of a *dvyamushyayana* form of adoption, there must be an agreement to that effect, and that the agreement must be proved by the person setting up the *dvyamushyayana* adoption, like any other question of fact, as much in the case of the adoption of an only son of a brother as in any other case of such an adoption. I refer here, of course, to the case of a *nitya dvyamushyayana*. An *anitya dvyamushyayana* is undoubtedly independent of an agreement; but with that we have nothing to do in this case.

The second contention relates to the question of fact. Mr. Jayakar has urged that having regard to Exs. 835, 833, 834, 144 and 120 it is clear that the adoption of Shrinivas was in the *dvyamushyayana* form. Both the lower Courts have considered this and other evidence and arrived at the conclusion that the adoption of Shrinivas was in the simple form and not in the *dvyamushyayana* form. These documents have been read to us, and I am unable to say that the finding of fact is not justified. There is no evidence of any stipulation between Lakshmipatirao and Hanmappa that Shrinivas was to be the son of both of them. The *yadi*, which is in the nature of a will, of Lakshmipatirao (Ex. 835) made in 1846 does not refer to any such stipulation. There is nothing

5. (1849-1853) 1 M S D A 234.

6. (1895) 19 Bom 428.

to show that Hanmappa treated Shrinivas as a *dvyamushyayana* son during his lifetime up to 1852. The statements of Lakshmibai, Shrinivas and Gangabai after Hanmappa's death do not establish the plea of a *dvyamushyayana* adoption. There is no reason to suppose that the presumption mentioned by their Lordships of the Privy Council in *Nilmadhur's* case (4), above referred to, has not been properly considered by the lower Courts in appreciating this evidence. Further, with reference to this presumption it has to be remembered, as pointed out by Sir Charles Sargent, C.J., in the Full Bench case of *Waman Raghupati Bora v. Krishnaji Kashiraj Bora* (7):

"that up to the time when *Laksmappa v. Ramava* (8) was decided with the exception of the opinion expressed by Sir Joseph Arnould . . . , the adoption of an only son had been regarded by the late Sadar Adalat and by this Court as valid."

The case of *Laksmappa v. Ramava* (8) was decided in 1875 and the opinion of Sir Joseph Arnould was expressed in 1869. The presumption therefore cannot be said to be particularly strong in favour of the appellant. For all these reasons, I think the concurrent finding of the lower Courts on this point must be accepted by us in second appeal. The next contention relates to the plea of limitation. This suit is admittedly governed by Art. 141, Limitation Act, 1877, and the suit filed in 1902, within four years of the widow's death, would be in time. The reversioners would not be affected by any adverse possession against the widow during her life: see *Runchordas Vandravandas v. Parratibai* (9). But it is argued for the appellant that before the Limitation Act of 1871 came into force, the title to this property was acquired by Shrinivasrao and the right to sue him had become barred within the meaning of S. 2 of Act 15 of 1877, in virtue of the Limitation Act 14 of 1859, on account of Shrinivasrao's adverse possession for over 12 years. The lower Courts have found that, assuming Shrinivasrao's possession to have commenced in 1852, it was not adverse to the widow Gangabai and that her right to sue him had not become barred in 1873 when the Limitation Act

of 1871 came into force and when Art 142 entitling a Hindu reversioner to sue within 12 years from the date of the widow's death was introduced for the first time in the Limitation Act of 1871. Mr. Jayakar has relied upon the same documents (Exs. 833, 834, 144 and 120) and an order (Ex. 846) made on the mamlatdar's report, as showing that the possession of Shrinivas must be held to be adverse to Gangabai since 1852.

This again is largely a question of fact. Though several cases have been cited in the course of the argument it is not necessary to refer to them. Both the lower Courts have come to the conclusion that the possession of Shrinivas was not adverse. Having regard to the fact that Gangabai was a young widow about 20 years old in 1852, it was quite natural that she would like the management to be carried on by Lakshmibai who was about 32 years old then or by Shrinivas who was about 18 years of age. It did not matter to her that the Revenue Authorities at the time declined to recognize Shrinivasrao's adoption by Laxmipatirao and entered Shrinivas's name in the revenue records in place of Hanmappa's name as his natural son. Out of all the agnates in the family, she would naturally turn to Lakshmipatirao's branch for assistance after Hanmappa's death. The statements above referred to show that Gangabai believed that she was an heiress to the property of Hanmappa and consented to the management by Lakshmibai. It would not matter to her whether Lakshmibai managed the property or Shrinivas did so. They all agreed at the time as to the management of the property, and there is no reason to suppose that the management was assumed by Shrinivas in 1852 in derogation of Gangabai's rights. Under the circumstances Shrinivas must be deemed to have been in possession of the property with the consent of Gangabai.

There is nothing to show that the possession which was permissive in the beginning, became adverse more than 12 years before the Limitation Act of 1871 came into force. The earliest overt act, of which there is evidence, is the mortgage of 1862 effected by Shrinivas. There is nothing to show that Gangabai had notice of this act or that under the

7. (1890) 14 Bom 249.

8. (1875) 12 B H C R 364.

9. (1899) 23 Bom 725=26 I A 71 (P C).

circumstances it was necessarily of such a nature as to alter the character of the possession. But this is well within 12 years prior to the Act of 1871. The Court would be slow to hold that possession which has commenced lawfully has subsequently become adverse to the rightful owner, unless the evidence clearly and unequivocally establishes the fact. There is nothing in the subsequent conduct of the parties or in the evidence to justify the inference that the permissive possession of Shrinivas became adverse to Gangabai more than 12 years before April 1873. Mr. Jayakar has argued that the possession, if shown to have been adverse in 1862, should be presumed to be adverse even prior in 1862. But I am quite unable to accept this argument. It is clear to my mind that the possession was permissive in 1852 and is not shown to have become adverse at any time for more than 12 years prior to April 1873. Thus assuming in favour of the appellant that prior to the Act of 1871 any adverse possession against the widow would be effective against the reversioners it is not shown that the widow right to sue was barred under Cl. 12, S. 1, Act 14 of 1859 before April 1873.

Mr. Coyaji has contended that having regard to the provisions of Bombay Regulation 5 of 1827, under which no title by prescription could be acquired without enjoyment of the immovable property for 30 years, as also to the absence of any section in Act 14 of 1859 corresponding to S. 28, Limitation Act 15 of 1877, defendant 1 or rather Shrinivasrao could not be said to have acquired a title to the property within the meaning of S. 2, Act 15 of 1877, before April 1873. He relies upon *Rangacharya v. Dasacharya* (10). Shrinivasrao's possession commenced in 1852 and he had not enjoyed the property for more than 30 years in 1873. It is also contended by Mr. Coyaji, that even if the widow's right to sue may have been barred in 1873, the plaintiff's right to sue could not be treated as barred within the meaning of S. 2, Act 15 of 1877, as the plaintiff claims as a reversioner in his own right and not under the widow. Thus his argument is that even if the possession of Shrinivas be adverse to the

10. (1913) 37 Bom 231=19 I C 337.

widow for over 12 years prior to April 1873, Shrinivas has acquired no title to the property and plaintiff's right to sue was not barred in April 1873 within the meaning of S. 2, Act 15 of 1877. It is really not necessary to consider this argument any further, in view of the conclusion I have arrived at on the question of adverse possession. But I am not at all sure that the plaintiff's right to sue can be treated as barred, if the widow's right to sue was barred before 1873, within the meaning of S. 2, Act 15 of 1877, as contended by Mr. Jayakar, and assumed by the lower Courts: see *Soni Ram v. Kanhaiya Lal* (11).

Lastly, as regards mesne profits, apparently no objection was taken in the lower appellate Court to the decree of the trial Court on this point. The only ground upon which the claim of the defendants-sharers to mesne profits is now resisted is that they were not claimed by the sharers in their written statements. I do not think that it would be just to construe the pleadings strictly as contended by Mr. Jayakar. The defendants-sharers claimed their respective shares, and it seems to me that on the pleadings it was open to the trial Court to allow mesne profits to all the sharers. The appellant has acquiesced in this decree in the lower appellate Court. I do not see any reason to disallow the mesne profits which have been allowed by the trial Court. The result is that all the contentions in support of the appeal fail, and that the decree of the lower appellate Court is affirmed with costs.

Batchelor, J.—I concur both in the conclusions and in the reasons of my learned colleague.

G.P./R.K. *Decree confirmed*
11. (1913) 35 All 227=19 I C 291=40 I A 74
(P O).

A. I. R. 1916 Bombay 77

BEAMAN, J.

Tehilram Girdharidas—Plaintiff.

v.

Longin D'Mello and another — Defendants.

Original Civil Suit No. 546 of 1915,
Decided on 21st January 1916.

(a) **Mortgage—Moveable property — Mortgage can be effected by parole and property in chattels at once passes to mortgagee.**

A mortgage of moveables can be as validly effected by parole as by a writing and the immediate effect of such a mortgage is to pass the pro-

perty in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual possession of the chattels should be given. [P 80 C 2]

(b) **Contract Act (1872), Ss. 108 and 178—Sections based on principles of estoppel—True owner cannot complain against bona fide purchaser for value**

Sections 108 and 178 are enacted for the protection of bona fide purchasers and pledgees and are grounded upon principles of estoppel. [P 84 C 1]

If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of and conferring a good title to it, and such a person does dispose of it, the true owner has no good ground of complaint against the bona fide purchaser for value. [P 84 C 1]

(c) **Partnership — Partners — Rights and liabilities of, inter se stated.**

Persons entering into agreements of partnership cannot be said to buy anything at all from each other. The most that any partner can be said to buy by putting money into a business in consideration of a partnership share in it is the right upon a dispute to a partnership account and division of any of the assets ultimately found due. [P 84 C 2]

T advanced to *V* a certain amount on the hypothecation of some press machines. Later on *D* entered into partnership with *V*. *V* thereafter again took a fresh advance from *T* on the hypothecation of the same press. On a suit by *T*, *D*, who had no notice of the transactions of *V*, with *T* resisted the suit on the ground that *T* could not proceed against his half-share in the press.

Held: that *T* was entitled to bring all the property in suit to sale under his mortgages. [P 85 C 1]

Wadia and M. J. Mehta—for Plaintiff.
Kolaskar and Gupte—for Defendants.

Judgment.—The plaintiff in this suit, a money-lender, claims to have a preferential right over all the creditors of the deceased Gabriel F. Vaz in respect of certain hypothecated property, being the press machines and other accessories of the Minto Printing Press. The Official Assignee, a party defendant in this suit, has taken no part in it. I suppose that is because the deceased Vaz has no other assets worth troubling about than the subject-matter of the present suit. The defendant D'Mello alleges that, on 3rd October 1914, he put Rs. 3,000 into what was thereon constituted a partnership between himself and Vaz for the working of the Minto Printing Press. He therefore contends that the plaintiff's claim, if in all other respects proved to be valid, must be restricted to a half-share of the assets of that partnership upon a proper winding-up.

On the one hand the defendant contends that the writings of hypothecation

of 11th March 1913 and 27th February 1915 are fabrications, and that, if there was any transaction at all between the plaintiff and Vaz, it went no further than an ordinary money loan secured by promissory notes. On the other hand, the plaintiff contends that D'Mello paid no consideration whatever for his half-share in the partnership and that if any transaction of the kind actually occurred in October 1914, it was entered into designedly in order to defraud him. A great deal of evidence has been recorded, much of it to prove the respective contentions I have just barely outlined and much of it directly to prove that the plaintiff not only obtained the hypothecation of the property in suit in March 1913 but actually took constructive possession thereof by affixing boards on the premises announcing to the public that he was a mortgagee in possession. The defendant is not now in a position to prove that the plaintiff's principal document, Ex. B in the case, dated 11th March 1913, was not what, on the face of it, it purports to be. Vaz died on the night of the 22nd or early morning of 23rd April 1915 by his own hand. He appears to have taken poison on or about 19th April and succumbed during the night of the 22nd. D'Mello has no knowledge of the transaction evidenced by Ex. B in the case and can only argue upon general grounds that the writing of that date, viz., the 11th March 1913, and the later writing of 27th February 1915, are fabrications made to support the plaintiff's case. Exs. B and F, the document creating the second charge, are signed by Vaz. They are written in the vernacular, and the defendant's suggestion is that the plaintiff got Vaz's signature to papers the contents of which he did not understand. I may briefly dismiss the evidence and state my conclusions upon it. I see no reason on this record to hold that Exs. B and F are not genuine papers, although I confess that I view them and their proprietor, the plaintiff, with considerable suspicion. Nor do I see any sufficient reason to doubt but that D'Mello paid Rs. 3,000 on 3rd October 1914 as consideration for a half-share in the partnership thereupon constituted and evidenced by the partnership deed of that date, Ex. 3 in the present case.

There has been a great deal of dispute over the payment of this consideration,

and the fact that the deed bearing date 3rd October is said, by some of the witnesses, to have been executed on the 5th. I attach little or no importance to these matters. I am satisfied that D'Mello gave valuable consideration for his share in the partnership, thenceforward intended to work the Minto Printing Press. I am further satisfied that D'Mello had no notice of the plaintiff's claim in October 1914. It is possible that the plaintiff may have occasionally stuck up his board on the Printing Press, but the evidence on behalf of the defendant is far too good and far too strong to allow me to entertain any doubt that a very great part of the plaintiff's evidence on this point is entirely false. And the defendant's evidence is such as to satisfy me that neither by means of these boards nor in any other way was notice given to D'Mello by the plaintiff of his alleged mortgage of the whole of the Printing Press plant. I could easily amplify my reasons for these conclusions, summarily stated, by an examination of the evidence more in detail, but I do not think it necessary to do so. Speaking generally, wherever that evidence conflicts with the defendant's evidence, I should not hesitate to reject the testimony given by the plaintiff, his nephew and his bhayas. With the single exception of Baptista, who appears to have acted very much in the plaintiff's interest in these matters, the whole of the plaintiff's evidence is of a character inviting the comment that it is completely subject to his control.

It is of the quality to be expected from witnesses of that class. On the other hand, the defendant, D'Mello, has not only given what appeared to me to be candid and straight forward evidence himself but has supported some of his contentions at least by the testimony of credible and unimpeachable witnesses such as Brewin and Templeton. There cannot be the least doubt, I think, but that D'Mello not only purchased a share in the partnership but immediately assumed predominant control of it, and from 3rd October 1914 to 19th April 1915 was in effect the sole manager of the Printing Press without any notice or suspicion of the plaintiff's claim to be a mortgagee of the entire plant. On 19th April 1915, becoming aware, I suppose, of Vaz's intended suicide, the plaintiff and his men hastened to the

Press to assert their rights and declare that the plaintiff was mortgagee in possession. This led to a serious fracas on the morning of the 22nd. Complaints were made in the police Court and the plaintiff was fined for trespass. These being the material facts, all of which I hold to be proved beyond reasonable doubt, I have to consider what is the legal position of the parties and to determine their relative rights and liabilities in the light of the facts so found.

I should mention that the first mortgage Ex. B, was for Rs. 2,000 at 18 per cent interest. On 27th February 1915, about three months after the partnership between D'Mello and Vaz had been constituted Vaz is alleged to have borrowed a further sum of Rs. 1,000 from the plaintiff and to have executed a further charge, at the same time re-affirming the earlier mortgage, by the document F in the present case. That paper contains no allusion whatever to what was then an undoubtedly existing partnership between Vaz and D'Mello. It contains a list of all the press plant and a statement that that plant had been assigned by a writing to the plaintiff on 11th March 1913. The rate of interest upon the total sum of Rs. 3,000 thus charged upon the plant of the Minto Printing Press was thenceforward to be 12 per cent per annum.

The case has occupied me a considerable time because it raises questions which have long interested me and upon the true legal answers to which I have for years felt much doubt. For that reason I have throughout suggested points and invited counsel to collect authorities bearing upon them, which might serve, if possible, to elucidate some definite and intelligible principle. I am much indebted to the industry and patience of the learned gentlemen on both sides, who have laid before me in this way a very great number of cases, both Indian and English, so enabling me to take a comprehensive survey of the whole of this most difficult and much vexed field of the law. Many of the cases cited proved to have no direct bearing upon what I understand to be the material question of law standing here to be answered. but all of them have illustrated other points of equity or law indirectly bearing upon the main question. I think that the result has

been to show how very difficult it is to extricate, from the mass of authority thus entangled by many converging and interpenetrating doctrines of the English law, any satisfactory ground upon which to rest in this country at any rate, what seems to have become settled as the legal doctrine of the mortgage of moveables. I have always felt almost insuperable theoretical difficulties in the way of making any such doctrine suitable for practical application by the Courts in this country indeed of its establishment at all as a proper extension of the corresponding doctrine governing the mortgage of immovables.

It might be thought that what is easy to state theoretically and administer practically in regard to immovable might be as easy to state and apply in regard to moveable property. This is by no means the case, and were the matter *res integra*, I should have no hesitation in deciding upon grounds of public policy quite apart from theory, that the Courts have no business to recognise the mortgage, in the wider sense of mere chattels. In the Statute law of India it would be difficult to find anything making it imperative upon Courts to acknowledge any such doctrine. In S. 3, T. P. Act, amongst other definitions, the definition of a chose-in-action mentions the hypothecation of moveables as though that were an accepted part of the law of this country and again in the Stamp Act, S. 2, Cl. 7. the like words are to be found. Elsewhere I do not believe that it would be easy to discover in the sufficiently voluminous Statute law of this country any warrant for the assertion that the Courts of India are bound to recognise a mortgage of moveables. Nor after having considered the case-law, both of this country and England which has gone to establish that doctrine, very carefully and critically for many years, am I able to discover any authority, in reason or equity, adequate to establish it. If however it is to be taken as a part of the law of India and in the existing state of the case-law I suppose it must be then it is very necessary to examine the essential ingredients of the mortgage of moveables and so arrive at a clear understanding not only of the nature of the legal notion but of all its legal consequences in relation to others who may have dealings

with or rights in the moveables so mortgaged.

We may take it on the authority of all the text-book writers that a mortgage of moveables can be as validly effected by parole as by a writing and that the immediate effect of such a mortgage is to pass the property in the 'chattels' mortgaged from the mortgagor to the mortgagee. It is all together unnecessary that actual possession of the chattels should be given. Thus, unlike a mortgage of immovable property, which no matter what its value, can only be effected in this country by a writing or a transfer of possession, mortgages of chattels, having the effect of immediately transferring the property thereunder from the mortgagors to the mortgagees can be made by mere parole and without the transfer of possession. It is only necessary to dwell for a moment upon this, in particular relation to the known conditions of life in India, to realise how heavily weighted such a doctrine must be with the gravest potentialities of mischief. I can hardly imagine any other legal doctrine that might be more mischievous or open a wider door to fraud and interminable litigation. There is no possibility, as far as I can see, of drawing any distinction between the so-called mortgages of moveables made by a few spoken words unaccompanied by possession and the like mortgages made by the most correct and artificial documents accompanied by possession.

The only possible justification which occurs to me for having accepted and enforced the principle of the mortgage of chattels in this country lies in the needs of considerable traders. Very true, in times of pressure and difficulty a trader may need large advances on the security of his stock-in-trade, and that security might be withheld if the stock-in-trade, whatever it might be at the time the payment was called for, could not be made primarily liable. Obviously too the creditor could not take more than symbolical possession of the stock-in-trade without defeating the very object of the loan. So that in cases of that kind there might be a reason for permitting the hypothecation of moveables on a large scale by the execution of properly drawn formal documents duly registered. But as the doctrine has been imported in its entirety from

England, its application in this country must be regarded as co-extensive with its application in England before a plentiful crop of abuses had necessitated the passing of the Bills of Sale Acts. And in England it was quite enough for any one borrowing to hypothecate orally anything and everything of which he might then be or in future become possessed as security for the loan. In such cases where possession is not taken, it is very easy to see practical difficulties of the most serious kind and put cases in which the results must be anything but equitable. Take the following two very simple illustrations of what is at the present moment passing through my mind. *A* being in need of money and possessing a gold watch goes out into the street and successively mortgages it to *B*, *C*, *D* and *E*, in each case for £5, the four transactions all occurring on the same day. Now, what are the resultant rights of the mortgagees *B*, *C*, *D* and *E*?

In England the text-book writers at any rate have gone the length of saying that once a mortgage of chattels is created all the subsequent dealings are to be treated on the same footing and governed by the same principles as the like subsequent dealings in relation to a mortgage proper. But analysis shows that that can hardly be the case where chattels are made the subject of what is called a mortgage immediately transferring the legal estate because we come at once in conflict with the principle to which expression is given in Ss. 108 and 178, Contract Act. The mortgage of chattels, whether by parole or by a writing, instantly transfers the property in the goods from the mortgagor to the mortgagee that is to say, immediately on payment of the price, or loan or mortgage advance. But let this be regarded from whatever point of view be chosen, it works out to this and nothing else: that every hypothecation of that sort is an out-and-out sale subject to a condition that the vendee will re-sell the chattel to the vendor at a certain price and upon certain conditions. But if it be an out-and-out sale, then in the case supposed the chattel mortgaged remains in the possession of the vendor with the consent of the vendee and each subsequent oral mortgage becomes a sale in turn. In the case

supposed, there could be no possibility of such circumstances existing as would put the second, third and fourth mortgagees, respectively, upon guard, while the possession of vendor would in each case be with the consent of the true owner. So that as far as I can see, in law the last mortgagee would be the only owner of the watch and the three prior mortgagees would have no claim upon it whatsoever. Or upon another view the first mortgagee might have the better claim and the others none. It could hardly be said that like the puisne mortgagees of real estate each had no more than a right to the equity of redemption. For that altogether ignores the very salutary and necessary principle of S. 178, Contract Act, regulating what actually occurs when these mortgages of chattels are effected. The subject is doubtless confused by substituting the word 'mortgage' with all its legal associations for the word 'sale.' But slurring over difficulties by the use of this or that word or the application of special terminology to the matter in hand is but too shallow a way of dealing with what is really going to the root of the principle. And the second illustration I give is that of a trader in active business to whom *A* lends, let us say, £1000 on the general faith of his solvency as exhibited by his possessions and more particularly by his stock-in-trade. Ten days later, *B* advances the same trade £1000 upon an oral mortgage of every stick and chattel of which he is then or may in future be possessed.

And later the trader becomes bankrupt or *A* takes out execution against him. Adopting the law of the mortgage of chattels, it is obvious that in both cases *B* will be the secured creditor with all preferential rights over *A* if in the former he has demanded the possession a day before the bankruptcy, though I am entirely at a loss to see what superior equity he has. It may be argued that *A* has been lending money upon the faith of reputed chattel possessions and takes his risk of their disappearing before he seeks repayment. That is undoubtedly true. On the other hand, apart from the doctrine of the mortgage of moveables and assuming that the possessions (chattels) upon which the money is really, though not in so many words stated to be, lent in specie at the time

the loan falls due, and supposing there is no question of preference, it is obvious that a creditor's remedy is exactly the same at law whether there be or be not any hypothecation, that is to say, in any money-decree a creditor may attach and sell any or all the property of his judgment-debtor. It thus becomes clear that it is only for the purposes of preference that there is the least need for this hypothecation of moveables.

And then, again, it could only be in cases where they, or, at any rate, a part of them or substitutes, in law their equivalents, exist in specie at the time the question of priority arises, that the hypothecation can be of value to the mortgagee. So that it really comes to this: that quite apart from any true equity, the creditor, who has been wise enough to stipulate in so many words that the money he advances is advanced on everything chattel which the borrower may then or thenceforward possess, is to have preference on that account over equally bona fide lenders, unaware of the oral contract, who have not been far-sighted enough to make such a contract of their own at the time of the advance; and it certainly appears to me that here we are faced with a very real difficulty, and with a doctrine of law, which, carried out logically, would certainly do more injustice than justice. For a man in a seemingly good way of business might go on for years borrowing money from creditors lending in good faith upon his apparent prosperity, while in fact everything moveable belonging to him may have been hypothecated orally to some other and earlier creditor, and so upon a case of preference arising, all later creditors would be unable to recover any part of their money; or in the event of each of them in turn having stipulated for the like hypothecation of all the debtor's moveables, a problem would arise, as I have already indicated, of which I do not believe any logical legal solution is possible.

I have felt it necessary to indicate, indeed within the compass of a judgment I can do little more than indicate, some points and lines of reasoning, which, being thoroughly exhausted and followed up, have convinced me that it is eminently desirable that the law of hypothecation or mortgage of moveables is in need of radical reform. This law,

it is to be observed, has been transferred bodily from England to India as part of the old Common law, and must therefore be administered here as it was in England before public policy required its correction and curtailment by the various Bills of Sale Acts. There are no such Acts in this country, and, in my opinion, we should be much better without them, provided that it were legislatively enacted that no Courts should recognize any mortgage of moveables for a less sum than, say, Rs. 5,000 evidenced by a registered writing.

That would suffice to meet the legitimate exigencies of trade; and smaller loans upon the hypothecation of chattels, especial or general, should, I think, be ignored, unless they fulfil all the requirements of a pledge. In this country we have a very precise and easily administered law of a pledge. Where money is really advanced upon a chattel and the property in that chattel thereupon passes to the creditor, it is only right that he should take possession of it and so prevent other people lending money to his debtor on the faith of his being the ostensible owner of goods which really do not belong to him. I may note in this connexion that several of the cases cited by Mookerjee, J., in the case of *Mahamaya Debi v. Haridas Haldar* (1), in support of his conclusion that a mortgage of moveables is recognized and established in this country as well as in England, appear to me to be cases which fulfil all the requirements of a pledge, and the only point with which the English Judges were concerned in those cases was the remedy of the mortgagee. The remedy of a pledgee is limited to sale, whereas in those cases the mortgagee was seeking foreclosure. That is a point with which I am not concerned here, inasmuch as I do not suppose that any Court in this country has yet decreed foreclosure of a chattel alleged to have been mortgaged.

Another point occurs to me in connexion with the principal contention of the parties. The facts I have found show that the plaintiff's first loan was made to Vaz before Vaz entered into partnership with D'Mello. The question naturally suggests itself whether in such circumstances a creditor can recover

1. A I R 1915 Cal. 161=42 Cal 455=27 I C 400.

against the partnership in excess of the share owned by his debtor therein. I not think that the answer to that would be affected by any stipulation such as is to be found in Ex. 3, that the partnership shall not be liable for any pre-incurred debts.

It must, at once, I think, be conceded that in the case of a simple money loan not in form professing to be a hypothecation made to a debtor, at that time not a member of any partnership, it could not possibly be enforced against the partnership, that is to say, in the case of a man, for example, who was not engaged in trade at all at the time he borrowed money, but a year afterwards enters into partnership and carries on business. Is that conclusion affected by a change in the circumstances? Let it be supposed that *A* is a sole trader and borrows a sum of money for the purposes of his business.

Presently, he takes *B* into partnership with him. Can the creditor now sue the partnership, as a partnership, for the money advanced to *A* as a sole trader? If that money has been employed upon the business and so entered as an ingredient into what actually became the subject-matter of the later partnership, there might be a strong theoretical reason for holding that the partnership was liable as a whole for the antecedent debt. The point is one of considerable nicety. In England the law seems to have been once at least laid down, without any doubt, or for that matter without giving any elaborate reasons, to the effect that *A* dealing with *B*, and *B* thereafter taking *C* into partnership and notifying *A* of the fact, *A* is put to his election upon the receipt of the notice whether to make *B* solely, or *B* and *C* jointly, answerable to him for the result of the dealing: *British Homes Assurance Corporation. Ltd. v. Paterson* (2). And in another and much earlier case, *Jackson, Ex parte* (3), the Chancellor was very much perplexed over the law proper to be applied to such a state of facts. There the real debt was an ordinary bond-debt, and the debtor subsequently took two other persons into partnership.

I gather from Lord Eldon's judgment that his opinion was that the partnership could not be made liable, if it were

a genuine trading partnership, for the pre-existing debt. On the other hand, reasons could easily be suggested why that law might operate very harshly and unjustly. If *A* advances to *B* a sole trader, a large sum of money on the faith of his stock in-trade, and the next day *A* having not other means takes nine other persons into partnership with him, it is obvious that a very great injustice might be done to the lender. Such considerations are peculiarly proper to cases of ordinary loans, and having regard to the established legal doctrine of the mortgage of moveables, I do not think that unless a general proposition be firmly established that every partnership was liable for all antecedent debts incurred in the same business prior to the partnership, it could be of any practical value for the purpose of my present discussion, and I am not at all sure that such a general legal proposition ever did warrant it.

I must therefore start once more upon the found facts from the point that, on 11th March 1913, the whole plant of the Minto Printing Press passed out of the hands of Vaz into those of the plaintiff. The plaintiff on the execution of Ex. B appears to have become in law, according to the old English doctrine, the true owner of all the property, the subject-matter of this suit. He allowed that property to remain in the possession of Vaz. I shall not again cover the ground in this judgment which I attempted to examine minutely and exhaustively in my judgment in the case of *Nandlal Thakersey v. Bank of Bombay* (4), touching the true meaning of the word "possession." Ever since the enacting of Ss. 108 and 178, Contract Act, notwithstanding the fact that they are designedly worded quite differently from anything to be found in the old English Factors Act and the like, the Courts in India appear to have struggled to confine the application of those sections within the very much narrower meaning prescribed by the terminology of the English Acts. Over and over again very learned and eminent Judges have interpreted those sections as though the word "possession" meant something very much more than in any known legal sense it does. But if the word had the meaning thus sought to be given to

2. (1912) 2 Ch 404=71 L J Ch 872.

3. (1709) 1 Ves Jr. 131=30 E R 265.

4. (1909) 4 I C 652.

it and no more, many of the very cases which those sections were intended to cover would be excluded from their operation. Reading the sections as they stand, it is only too obvious that they were advisedly worded to have much larger and freer scope than the English Factors Act. Commentators, I notice, referring to the discussion which arises over these sections before the Contract Act was passed, record objections to them on the score that they convert the whole of India into a market overt. But confining myself to S. 108, at any rate, such an objection appears to be out of place.

It is essential that possession should be with the consent of the true owner, and that, just as the proviso to S. 178, excludes all cases of property which had been stolen or acquired by any dishonest means. And if the intention of the legislature had been as the Courts have often enough interpreted it, that is to say, that possession in those sections should mean possession for a limited and specified purpose, it would have been easy enough to say so. The truth is that the sections are enacted for the protection of bona fide purchasers and pledgees and are really grounded upon principles of estoppel. If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of and conferring a good title to it, and such a person does dispose of it, the true owner, as far as I can see, has no good ground of complaint against the bona fide purchaser for value. I am not therefore disposed now any more than I was in the year 1909, to adopt the very narrow construction put upon these sections in the various decisions of the Indian High Courts. Their language appears to me to be too plain to admit of any doubt, and I do not think that we have any right to go behind that language and limit it by reference to a supposed historical tradition.

In the present case, then, I find that while the true owner of the plant of the Minto Printing Press in October 1914 was the plaintiff Tehilram Girdhardas, Vaz was in possession with his consent. That being so, had Vaz sold the whole or any part of the property in suit to D'Mello without notice and in the absence of any circumstances putting

D'Mello upon inquiry, and D'Mello had paid the sum in good faith, believing Vaz to be the real, as he was the ostensible, owner, then I should have no doubt whatever in holding that D'Mello had acquired a perfectly good and valid title against Tehilram. Unfortunately, that is not what occurred. And a further difficult question arises, viz., what actually passes in such a transaction as that evidenced by Ex. 3 in the present case. It cannot be said that Vaz sold any part of the Printing Press machinery to D'Mello. The contract is that D'Mello is to put Rs. 3,000 into the business and thenceforward is to become a joint owner with Vaz of all the Printing Press plant, etc. Now, persons entering into agreements of partnership, cannot be said to buy anything at all from each other. Both persons remain, as long as the partnership exists joint owners *per mie et per tout* of all the partnership assets, and it is impossible to say at the date of institution of the partnership what any partner may have acquired as consideration for the money he has paid in order to become a partner. That can only be ascertained upon a dissolution of the partnership when all the assets of the partnership, as they stood at the time it was constituted, may have finally disappeared. The most that any partner can be said to buy by putting money into a business in consideration of a partnership share in it is the right upon a dispute to a partnership account and division of any of the assets ultimately found due.

It is clear that, on 3rd October 1914, D'Mello cannot be said in law to have purchased any part of the property left in the possession of Vaz by the true owner Tehilram. Nevertheless it might be contended that by parity of reasoning and on analogy, D'Mello, in equity, at any rate, should be entitled to exclude from the materials available for the satisfaction of Tehilram's debt one-half of the partnership assets after such should have been ascertained upon a winding up; and that is the view I should very much like to take because I think it is most consistent with the justice of the case; but long and anxiously as I have pondered over it, I am unable to discover any solid legal ground upon which to put it. If there was no sale of any definite chattel to D'Mello

in October, it follows that he cannot take the benefit of S. 108, and there is no other section in our Statute law which extends that principle to a case like this. It could be by analogy and by breaking new ground altogether that D'Mello could be brought within the protection of S. 108. In my opinion, although the equity of the case is very strongly on his side, as long as this very mischievous doctrine of mortgage of chattels is part of the law of the country, I see no escape from the consequence that Tehilram, the plaintiff, was, on 11th March 1913, and has since remained, and still is, the true owner of the property in suit covered by the mortgage-deeds of 11th March 1913 and 17th February 1915. It is not really a case of preference at all. As I understand the law, it is a case of property supposed to belong to A being found to belong to B; and if that be so, anyone in possession of it admittedly from A, or claiming through A, would have no case against B. That I take to be the true legal position occupied respectively by D'Mello and the plaintiff in this case.

I have come to this conclusion only after long and anxious reflection and the study of a very great number of cases. I have come to it, too, with great reluctance, because it rests upon a doctrine which I should like to see wholly abolished, or, at any rate, confined within such narrow limits as to make it incapable of lending itself to further frauds and injustice. I am not in a position to make new law. I can only administer the law as I find it to be and understand it. Since there has been no transfer by sale or pledge of any part of the property belonging to Tehilram and left by him in possession of Vaz it appears to me that his rights over it acquired in 1913 remained wholly unaffected by the illusory partnership, purporting to cover it, entered into between D'Mello and Vaz on 3rd October 1914. I must therefore hold that the plaintiff Tehilram is entitled to bring all the property in suit to sale under his mortgage-deed of 11th March 1913, Ex. B. And as to the second mortgage of 22nd February 1915, although there might be some theoretical difficulty in supposing that the amount is advanced on the security of his own property, yet being his own pro-

perty in law I suppose it will have to be conceded that he is entitled to recover the amount of that charge also from the sale-proceeds. This suit must now be decreed against both the defendants with all costs. The order of 5th July 1915 to continue. Liberty to both the sides to apply. The sale to be effected after six months, within which time D'Mello may redeem or settle with the plaintiff if he likes.

G.P./R.K.

Suit decreed.

A. I. R. 1916 Bombay 85

BEAMAN AND HEATON, JJ.

Moti Raiji—Defendant—Appellant.

v.

Laldas Jibhai and another—Plaintiffs—Respondents.

Letters Patent Appeal No. 49 of 1915, Decided on 28th September 1916, from decision of Batchelor, J., in Second Appeal No. 473 of 1914.

(a) Hindu Law—Widow — When can convey greater interest.

There are only two ways in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has : the one is by acceleration, the other by alienation for legal necessity.

[P 86 C 2]

(b) Hindu Law—Widow — Alienation, acceleration distinction between, stated.

The notions conveyed by the said two terms are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration.

[P 88 C 1]

(c) Hindu Law—Widow — Doctrine of acceleration—Essential condition is that interposed life estate should be entirely withdrawn.

The true doctrine of acceleration, which has been incorporated with the general body of Hindu law by the decision of the Privy Council in 19 Cal. 236, is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this: that a Hindu widow enjoying the normal Hindu widow's life estate may, if she please, surrender it in favour of the next reversioner, and, if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life-estate should be entirely withdrawn and not merely a fractional part of it : 19 Cal. 236, *Diss. from*.

[P 88 C 1,2]

(d) Hindu Law — Widow — Alienation by must be for legal necessity.

For the purposes of an alienation, if the widow is to convey more than her life interest, it must be for purposes of legal necessity.

[P 88 C 2]

(e) Hindu Law—Widow—Alienation—Consent of reversioner—Value of, stated.

The consent of the reversioners to a Hindu widow's alienation is no more than a factor in

the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but per se it will not be sufficient to do away with all other proof: 10 Cal. 1102, *Disapproved*. [P 89 C 1]

(f) Maxims—A man cannot take advantage of his own fraud — Maxim is quite distinct from doctrine of estoppel—Conditions of applicability stated.

The maxim that "a man shall not take advantage of his own fraud" is quite distinct from the doctrine of estoppel. Two things have to be looked at in applying the maxim: (1) whether the person against whom this maxim is sought to be used has ever committed any fraud at all; (2) whether assuming that he has committed constructive fraud, that has given him any advantage in the particular issue he is contesting. The maxim applies to a great number of cases in which there need be no estoppel at all.

[P 91 C 2; P 92 C 1]

(g) Hindu Law — Widow — Adoption — Estates vested before adoption will not be divested.

An adoption will not divest vested estates before it was made. The adopted son can however question an alienation as void and not binding on him as and from the date of his adoption, as an alienation requires for its validation legal necessity.

[P 93 C 2; P 94 C 2]

One B, a Hindu widow, having mortgaged her husband's estate in 1893 to defendant 1, the plaintiffs as next reversioners sued in 1893 for cancellation of the mortgage. The matter was referred to arbitrators, who in December 1894 drew up an award whereby (1) plaintiffs were to redeem the mortgage on payment of Rs. 1,700 to defendant 1 and the latter was to reconvey the properties to them; (2) out of the properties so reconveyed the plaintiffs were to give to the widow a house and 18 bighas of land for her maintenance. Nothing however was done upon the award for many years, nor did the parties get it made a rule of Court. Defendant 1, mortgagee, sub-mortgaged the property for Rs. 1,000 to one D and under that mortgage he attorned to the latter. In 1906 the widow sued to redeem the mortgage, ignoring the award. That suit was dismissed on the ground that by the award there was no right of redemption in the widow. About this time, plaintiffs obtained a conveyance of the properties from defendant 1 which they got compulsorily registered. Under its terms they redeemed the sub-mortgage to D, but defendant 1 refused to deliver the properties to the plaintiffs. In 1909 the widow adopted defendant 2, the son of defendant 1, and the properties were delivered to him by the latter. Plaintiffs instituted the present suit for possession, alleging that the effect of the award was an acceleration of their rights and that the subsequent adoption of defendant 2 could not defeat the estate already vested in them. They also alleged that the adoption was a fraudulent act of defendants acting in concert to defeat plaintiffs and that defendant 2 could not be permitted to take advantage of his own fraud:

Held: (1) that the award of 1893 was in no sense an acceleration as the entire interest of the widow did not pass to the plaintiffs, but there was provision for the immediate restitu-

tion to her of a substantial portion of the property, which violated the fundamental basis of the theoretical doctrine of acceleration; (2) that the transaction could only be regarded as an alienation by the widow, to validate which the plaintiffs were bound to show legal necessity; (3) that defendant 2, as adopted son of the last male owner, was entitled to question the alienation as being void against him as from the date of his adoption; (4) that as the adoption was legal per se, the resort to it as a means of asserting one's rights did not amount to fraud and the Court could not consider the meanness about the line of conduct pursued by defendant 1 to get his son adopted by the widow: (1897), P. J. 273 and 36 Bom. 185, *Ref.*

[P 90 C 2; P 95 C 2]

G. K. Parekh—for Appellant.

G. S. Rao—for Respondents.

Beaman, J.—There are only two ways, we think, in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has: the one is by acceleration, the other by alienation for legal necessity. In the present case, limiting the contest to the appellant, defendant 2, and the plaintiffs, there can be no question of legal necessity. Both have pleaded at various stages that the original alienation by the widow, Bai Lala, of the year 1893 was without consideration. It does not lie therefore in the mouth of the plaintiffs now to contend that that alienation was for legal necessity. The only question remaining to be answered is whether, as a result of the alienation of 1893, the widow accelerated her estate in favour of the plaintiffs. In order to make what follows clearer, we shall briefly state the material facts upon which this question arises.

Bai Lala, the widow of one Raiji, was left in possession of a widow's estate in all his property. He died leaving no issue. In 1893 Bai Lala mortgaged the whole estate to one Bechar for a sum of about Rs. 3,500. Almost immediately the plaintiffs who claimed to be the next reversioners, and in the course of all subsequent proceedings appear to have been admitted to be so, brought a suit to set aside this alienation on the ground that it was a hollow transaction, and that the widow had received no consideration. The suit was, on the face of it, premature, since at that time it may be doubted whether the plaintiffs had any locus standi. But with that we are not now concerned. What actually happened was that the matters in dispute were

referred to arbitration, and an award was given by the arbitrators out of which all the subsequent rights of the parties inter se are held to have flowed. That award was not brought into Court or converted into a decree, but it has been confirmed, to some extent at any rate, by a decree of this High Court in the year 1911. In effect the award ordered that the plaintiffs should be allowed to redeem the estate mortgaged to defendant 1 Bechar for a sum of Rs. 1,700, and that on this being done Bechar was to convey the mortgaged estate, not to the original mortgagor Bai Lala, but to the plaintiffs, and that Bai Lala was to surrender all her right, title and interest in it, and that thereupon the plaintiffs in turn were to give to Bai Lala a house and 18 bighas of land, out of the estate so reconveyed to them by Bechar, for her life as maintenance. The award fixed the term within which the plaintiffs were to pay Rs. 1,700 to the original mortgagee Bechar, and that term ended with Magsar 1894. Such were the terms of the award. Nothing was done upon it for many years, and it appears that the mortgagee Bechar sub-mortgaged the property to one Desai for a sum which we will state roughly at Rs. 1,000. Under that mortgage Bechar attorned to his mortgagee Desai, and at a very much later period Desai actually brought a suit to recover one year's rent from Bechar and got a decree. That was somewhere in the year 1907, long before which the other transactions had occurred which we will now mention.

Between 1894, when the time limited by the award had expired, and the year 1906, all parties interested in the award appear to have rested on their rights, and taken no steps to enforce them. About that period the widow Bai Lala brought a suit to redeem the mortgage, ignoring the award and the suit in which it had been given. That was the case which came up ultimately on second appeal to this High Court in the year 1911, and was decided by a Bench consisting of Chandavarkar and Heaton, JJ. Those learned Judges limited their conclusion most strictly to this: that the effect of the award had been to transfer the equity of redemption from Bai Lala to the plaintiffs, and therefore that her suit to redeem must fail. I neglect any obiter dicta in the judgment of Chandavarkar, J.,

which go beyond this conclusion. At or about the same time the plaintiffs bestirred themselves and attempted to obtain a conveyance from Bechar of the whole mortgaged property.

This was about the month of April 1906. Bechar refused to consent to the registration of this conveyance, although he admitted that he had executed it. The plaintiffs got it registered. In this conveyance we find a term authorizing the plaintiffs to redeem out of the sum of Rs. 1,700, which they had under the award to pay to Bechar, the sub-mortgagee Desai, and this they appear to have done early in the year 1907, and obtained for themselves a reconveyance from the sub-mortgagee, including of course such landlord's rights as had come into being between the sub-mortgagee Desai and the original mortgagee, Bechar, under the latter's mortgage to the former. In 1909 or thereabouts, the widow Bai Lala appears to have adopted the present defendant 2, who was the natural son of the original mortgagee. The plaintiffs appear to have taken no steps under their conveyance to regain possession of the property, nor did they then or at any time before the institution of this suit pay to the original mortgagee Bechar Rs. 700 which were still due to him under the award, in which this payment had been made a condition precedent to calling upon him for a reconveyance, and so obtaining possession of the mortgaged property. Before this suit was instituted it would appear that defendant 1, Bechar, made common cause with his natural son, defendant 2, appellant here, and his guardian the widow Bai Lala, and left defendant 2 into nominal possession at least of the mortgaged property by the widow, his guardian. Thereupon the plaintiff brought this suit to recover possession of the mortgaged property under the award of 1893, and was resisted by defendant 2 who is the appellant here. The appellant, defendant 2, has set up a title paramount both to that of the mortgagor and the mortgagee, treating the plaintiff under the award of 1893 as mortgagor. His contention is that the whole transaction of 1893 was a hollow sham, and that he as the adopted son of Bai Lala was entitled from the moment of his adoption to challenge, and making his challenge good, to set it aside. That

was the position when the parties went to trial.

We now revert to the first question we have to answer. Was the transaction which resulted from the suit of 1893 an acceleration of Bai Lala's estate in favour of the plaintiffs, the next reversioners? We have been referred to several cases in the Calcutta and Madras High Courts in which the topic of acceleration has been, if not exhaustively considered, glanced at, in connexion with another feature of the Hindu law, which, in the gradual progress of judicial decisions, seems to have got inextricably confounded with it. We are unable to agree with the decisions either of the Calcutta High Court, which appear to us to overlook almost entirely the essential conditions of a true acceleration, or the decision of Sir Sankaran Nair, J., in the Madras Full Bench case of *Rangappa Naik v. Kamti Naik* (1), in which he treats the facts before him as indubitably constituting a true acceleration. In our opinion that was not a case of acceleration at all, as we shall presently show, and neither of the two other learned Judges who made up the Full Bench placed their decision upon that ground.

In order to understand the great confusion of thought that appears to have gathered about the subject, extremely simple in itself, it is necessary to remember that the conflict of judicial authority which has been supposed to exist between the Calcutta and the Bombay High Courts for many years is upon a point which has really nothing to do with acceleration at all. We began by saying that there are only two ways in which a widow in possession of a life-estate can convey a greater interest than that which she herself has, the one being acceleration, the other alienation for legal necessity. A moment's analysis of these legal notions will show that they are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration. The true doctrine of acceleration which has been incorporated, and speaking for myself, I think very unfortunately incorporated, with the general body of Hindu law by the decision of the Privy Council in *Behari Lal v. Madho Lal Ahir Gaya-*

wal (2) is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this: that a Hindu widow enjoying the normal Hindu widow's life-estate may, if she please, surrender it in favour of the next reversioner and if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life estate, which prevents the family property taking its normal course and going into the hands of the next reversioners, members of the same family, should be entirely withdrawn.

Both theoretically and for obvious reasons of practical policy it is indispensable that this condition should be found to exist. It will not do for a widow, as appears to have been supposed in one judgment at least of the Calcutta High Court, to accelerate a fraction of her life-estate. That is utterly opposed in theory to the English doctrine, which is thus being transferred bodily and made an integral part of the Hindu law of the joint family. It is also open to the most obvious practical objections, and that is why the Privy Council laying down the limitations of the rule of acceleration to the case of *Behari Lal v. Madho Lal Ahir Gayawal* (2) insist in language which we do not think could have been made clearer, that for a good acceleration in law it is absolutely necessary that the entire interposed life-estate should have been withdrawn. But what has happened throughout the course of decisions both in Calcutta and Madras has been a blending of a totally different set of considerations with those plain and easily intelligible limitations placed upon the doctrine of acceleration. For the purposes of an alienation, if the widow is to convey more than the estate which she herself has, that is, an estate co-extensive only with her own life, the rule of Hindu law from the very first, a rule we believe universal over the whole country, has been that such alienation must be for purposes of legal necessity. Now it will be observed that considerations applying to alienations of that kind would necessarily be totally different from considerations applying to a case of true acceleration.

1. (1908) 31 Mad 366.

2. (1892) 19 Cal 236=19 I A 30. (P. C.).

For in a case of acceleration the property remains in the family where it was originally acquired, whereas in a case of alienation, if that alienation be shown to have been for legal necessity, the property is finally gone out of the family. That is why rigorous insistence has always been placed by the Courts upon the proof of legal necessity. But in Calcutta from a very early period all the Judges appear to have leaned strongly to the view that any alienation made by a widow, tenant for life, with the consent of the next reversioners would on account of that consent per se be a good absolute alienation so far as the reversioners, the original members of the family, were concerned. The reasoning was this: that since the reversioners themselves who were expectant upon the widow's life-estate had consented to her transferring the whole or any part of the property, in which she had that life-estate, to a stranger from whom neither they nor any other member of the family could ever afterwards recover it, the inference must be irresistible that they agreed with the widow that there was legal necessity. The Bombay High Court on the other hand never went that length, and has never fallen into the same confusion which characterizes the dicta of many eminent Judges both in Calcutta and Madras upon questions which may belong really to the doctrine of acceleration rather than that of alienation for legal necessity. The Bombay view has always been, and speaking for myself, I again say that, in my opinion, it has been logically correct throughout, that the consent of the reversioners to the Hindu widow's alienation is no more, and never ought to be anything more, than a factor in the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but per se it will not be sufficient to do away with all other proof.

The substitution of the mere consent of the next reversioners for the proof of legal necessity is the main point of difference between the current of decisions in Calcutta and in Bombay, and the confusion which has resulted both in the application of the law appropriate to cases of true alienation and in cases which are supposed to be cases of acceleration is easily discernible as soon as the

leading cases in Calcutta and Madras are subjected to critical consideration. Thus we find Garth, C. J., and Mitter, J., in one Calcutta case, viz., *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (3), stating that inasmuch as it is now an admitted feature of Hindu law that the widow may accelerate her life estate in favour of the next reversioner, it is impossible to assert that the consent of the next reversioner to the alienation by the widow, of a part of the whole estate in which she has a life-interest will not validate and make such alienation absolute.

So far from that being, in my opinion, a correct statement either of the law or its reason, it is quite easy to show where the fallacy lies. It is one thing for the next reversioners to receive the property into their own hands through any act which is tantamount to the civil death of the tenant for life, but it is a very different thing to say that because this may occur, it necessarily follows that the consent of the next reversioners will validate the absolute alienation to an outsider of the entire estate in which the widow has a life-interest and that is point which deserves the more weight if we allow that acceleration may be for valuable consideration. In strictness, speaking for myself again, I doubt whether acceleration proper ought to have any connexion with valuable consideration, but in actual practice it would be impossible, I suppose, to draw a line of that kind. Admitting that a widow may accelerate for valuable consideration, it is obvious that if we by a loose analogy extend the doctrine so far as to say that by purchasing for like consideration the consent of the next reversioner she may dispose of the whole estate so as to take it out of the family and hand it over to an outsider, the door is at once thrown wide open to many transactions of extremely doubtful morality. To give an instance which may illustrate my meaning there might be a young widow left with a life-estate in a great property, and the next reversioner might be an old man of seventy years of age with no reasonable expectation of surviving her.

She might very easily purchase his consent at a nominal figure and sell the

entire estate of her deceased husband for a great cash consideration to be spent by her upon her own pleasures and indulgences. Now such a case brings out clearly the radical distinction between true acceleration and alienation. In all accelerations to talk of the consent of the person in whose favour the acceleration is made is to use words without meaning. Commonly he who is put in possession of an estate immediately for which he might otherwise have had to wait many years will consent, and that consent can have no legal significance whatever; nor is there any distinction to be drawn in cases of alienations for legal necessity, between the alienation of a whole or part of the estate in which the widow has a life-interest. If the necessity goes the length of compelling her to alienate the whole estate, that alienation will be as valid in law as the alienation of a part. But as we began by saying, it is different in a true case of acceleration. For there the indispensable condition is the withdrawal of the entire life-estate, an obstruction which prevents the property taking its normal course, and there can be in our opinion, no such thing as an acceleration of a part of the life-estate or of a part of the property over which the life-estate extends, although that view has led to very confusing dicta to be found in the judgment's both of the Calcutta and Madras High Courts.

There is of course no analogy between the case of acceleration which requires the surrender of the entire life-estate and the case of alienation for legal necessity which might cover the smallest fraction of the whole, and yet it appears to have been seriously argued in one judgment, at any rate, to be found in the Calcutta law reports that because in case of acceleration the whole life-estate has been withdrawn therefore a widow may not alienate for legal necessity anything less than the whole estate in which she has her life-interest. Such a contention, we do not think, was ever made before. It certainly never has been made in this High Court and never seriously been considered here. Having thus endeavoured to make as clear as possible the fundamental distinctions between a true acceleration and an alienation for legal necessity, having endeavoured to show that neither in principle nor in practice have they any logical

connexion with each other, we will return to the facts of the present case, in order to decide whether those facts do reveal and constitute a good case of true acceleration. The learned Judge below has laid down the condition of acceleration with perfect correctness. So far we are in entire agreement with him. But we do not think that the facts fulfil those conditions. If we look at the award itself out of which this acceleration is said to have arisen, we feel quite incapable of separating its parts and giving it a different construction as a result of this separation from that which read as a whole it seems naturally to bear.

What the the widow had to do was to surrender her life-interest in the whole of her husband's mortgaged estate to the plaintiff, the next reversioner, upon the plaintiff having redeemed that estate, at about half the figure at which it was mortgaged, from the mortgagee, and thereupon the plaintiff in turn had to restore to the widow what amounts roughly to about one-third of the entire estate, and we cannot allow ourselves to be blinded by mere formulary expressions to the true nature of the entire arrangement contemplated by the parties. That appears to us to be so plain upon the face of the document that it can admit of no serious doubt. The learned Judge below supposed that if consideration were needed for acceleration at all the consideration to be found here was the redemption of the property by the plaintiffs for a sum of Rs. 1,700. Without going too closely into that, and allowing that it might in one view be regarded as consideration, it is strange that the learned Judge should apparently have overlooked what is so obviously the substantial, natural and true consideration flowing from the plaintiffs to the widow. That beyond all question or doubt was the immediate restitution to her for her life of one-third of the entire estate, and we can see no difference in principle between such an arrangement and a reservation at the time of an intended acceleration by the life-tenant of a substantial interest in the estate so accelerated. Stripping off all verbiage, it comes to this and no more. The widow might have said:

"I will surrender two-thirds of my husband's estate to the next reversioner retaining one-third for the remainder of my life."

The addition of the word "maintenance" in the award really makes, we think, no difference whatever. The two acts are reciprocal, and the test is simple. If the widow had refused to carry out her part of the agreement, would any Court have compelled her to do so without at the same time compelling the plaintiff to perform his? The result thus arrived at is precisely that which, upon a true application of the principle of acceleration, makes a nominal acceleration of this kind bad and void in the eye of the law. For, for reasons of policy, as indicated by their Lordships of the Privy Council, it is absolutely necessary that the widow should withdraw her entire life-estate, this being the only guarantee that the acceleration is genuine and not made from corrupt motives in order to favour a special reversioner. Entertaining doubt, as I do, of the desirability of ever introducing this doctrine of the English law into the Hindu law of this country (I do not think that it ever really was a part of the Hindu law), I feel no doubt whatever that its application must be confined within the narrowest limits. Any undue loose extension of it might give rise to dishonest transactions and complicated litigation. Whether or not consideration ought to be regarded at all as part of a good acceleration, this much is certain that consideration of the kind we find expressed in this award is really no consideration, but a reservation in the widow's interest of a very substantial part of her original life-estate, and that violates the fundamental basis of the theoretical doctrine of acceleration. In our opinion that alone is sufficient to show that this was in no sense a case of acceleration, and we are not disposed to stretch the law so to include a single doubtful case, nor do we consider that there are any merits or equities in the plaintiffs' favour which require us to do so.

There remains one other point and that a point of considerable nicety to be dealt with before we come to our final conclusion. In the Court of first appeal as well as in the lower Court, the learned Judges appear to have thought that upon the general ground that no man shall take advantage of his own fraud, defendant 2 cannot in this suit at any rate contest the plaintiffs' claim to possession, and the learned Judge of second appeal

relies upon two cases, one of *Anant Sitarambawa Pujari v. Ramchandra Atmaram* (4), decided by Farran, C. J. and Candy, J., and another much more recent case: *Hillaya Subbaya Hedge v. Narayanappa Timmaya* (5), decided by Russell, J. and Chandavarkar, J. In the first of these cases the learned Judges held that the defendant being a tenant of the plaintiff, and having let in fraudulently and collusively defendant 2 who denied the landlord's title, the latter could not be allowed to resist the landlord's suit to recover possession, but must first surrender and then set up any title he had in a separate suit. This proceeds merely upon the ground of constructive estoppel as between landlord and tenant, although their Lordships appear to have put it upon the much wider ground of the maxim that no man shall take advantage of his own fraud.

The second was a case of a mortgagor retaining possession of his land, against whom the mortgagee brought a suit upon the mortgage for possession. The mortgagor was found to have let in another person who claimed by title paramount, and the Courts held that that person could not resist the mortgagee's suit. He was first to give over possession and then sue on his own title. The latter case goes very far and the learned Judges expressly put it upon the ground of estoppel. It is a somewhat confusing case, because there is much in the judgment of the learned Judge who delivered judgment which is difficult to reconcile with the statement of facts upon which the judgment is based. However that may be, assuming that any given case is not one of estoppel, but referable to the general maxim that a man shall not take advantage of his own fraud, there are obviously two points first to be looked at: one is whether the person against whom this maxim is used has really committed a fraud at all; and the next is whether, assuming that he has committed a constructive fraud, that has given him any advantage in the particular issue he is contesting. Now it is perfectly obvious upon examination not only of the case law on the subject, but of the theoretical test of the notion embodied in the maxim, compared with

4. (1897) P J 273.

5. (1912) 33 Bom 185=12 I C 913.

that of estoppel, that the two are quite distinct.

The maxim applies to a great number of cases in which there need be no estoppel at all. It being remembered that estoppel is always and in strictness no more than a rule of evidence, it is clear that its operation would hardly extend to cases which yet might well fall under the broad equitable maxim. It is easy to put cases of that kind in which there could have been no misrepresentation by the alleged fraud-feasor, in which his conduct may have been throughout wholly unknown to the plaintiff who seeks to shut him out of Court on the ground of his fraud. But there are cases, such as those which I have already mentioned, relied upon by the Courts below in which the two grounds of exclusion may appear to overlap, and certainly are not easy to keep definitely and distinctly apart. That is because of the case with which a constructive estoppel is raised and entertained by the Courts. Allowing the fullest weight both to the legal maxim and to cases of constructive estoppel, we still have to deal with the facts before us, and we shall deal with them particularly with reference to the two points we have noted, first, whether defendant 2 has really been guilty of any fraud at all; secondly, whether, if so, that fraud has given him any advantage in the special issue to be determined between him and the plaintiff.

This is clearly not a case now of constructive estoppel, such as might be extracted from the mortgagee in possession fraudulently and collusively handing over the security to a third party, knowing that party is not claiming through him and intending to resist the mortgagor, should he seek to redeem, by paramount title. For, as far as we can see, whatever relation between the mortgagor and mortgagee might have been brought into existence by the award of 1893, that must clearly have come to an end, when defendant 1, Bechar, reconveyed the property to the plaintiff by a registered instrument in 1906. The matter has been complicated by the introduction of the sub-mortgagee, and it is only by reason of that introduction that the Courts below appear to have found their way without much difficulty to the conclusion that the original mortgagee Bechar being the plaintiff's tenant, since

the sub-mortgagee assigned to the plaintiff, there arises a constructive estoppel against defendant 2 who has thus been let into the tenant's possession.

That might be so, if we assume that the assignment of the sub-mortgage by Desai to the plaintiffs really conveyed to the plaintiffs any subsisting rights against his own mortgagee, defendant 1. But if we look to the terms of the conveyance itself, and if we look further back to the origin of the rights of the parties in the award of 1893, we find some difficulty in coming to this conclusion. Although in this suit the plaintiff is not ostensibly suing as a mortgagor to redeem, that is the only true legal ground upon which his right in this suit can be placed. Under the award he had the right, we will say, to redeem Bechar on payment of Rs. 1,700, and he had no other right whatever. Accordingly, in 1906, although by that time any right which he may have had on the award of 1893 had long been time-barred, he actually does obtain a conveyance from the mortgagee on consideration of his paying off the sub-mortgagee and at the same time handing over the balance to the original mortgagee. Looked at as a whole then, the result of this transaction appears to be that the payment by the plaintiff to the sub-mortgagee Desai was no more than a payment by the mortgagee's agent to his sub-mortgagee, and any benefit arising from such payment ought certainly to have gone to the mortgagee and not to the plaintiffs, mortgagors. Look at the transaction a little more closely, and it comes to this. The plaintiffs had to pay Bechar Rs. 1,700. Bechar, in anticipation of receiving that sum, reconveys the whole property to the plaintiffs, which we may observe he was not bound to do. Suppose the plaintiffs, Bechar and Desai had all three met together at this time, and pursuant to the true and honest intent of the parties, the plaintiffs had handed Rs. 1,700 to Bechar, and Bechar thereon had immediately given Rs. 1,000 to Desai, can it be said that the plaintiffs by such a payment would have acquired any of the rights of Desai against Bechar? We think there can be but one answer.

We think that that is in effect what happened, though it has been obscured by the forms through which the parties

have gone. The money paid to Desai was not in any real sense the plaintiffs' money. It was Bechar's money paid in advance for Bechar, not money paid by the plaintiffs independently on their account to Desai. Therefore we think that the plaintiffs cannot take advantage of the assignment which Desai then gave them, if they seek to use it adversely to Bechar. We think that the moment Bechar reconveyed the mortgaged estate to the plaintiffs, he ceased to fill the character of a mortgagee at all and in any view can be on no higher footing than that of a lienor for the unpaid balance of the purchase-money. And, speaking for myself, I am not aware that the person so situated would be under any fiduciary obligation to the owner of the property. So far from that being the case, by surrendering the property to another person claiming by title paramount he would only jeopardise his own lien. By this analysis, we have surmounted most of the difficulties arising out of the case law which doubtless appeared so insurmountable to the two lower Courts of appeal, and led them to the conclusion that Bechar stood in a fiduciary relation to the plaintiffs, that he betrayed that relation in making over possession to defendant 2, and that as a result of that breach of trust defendant 2 has gained a substantial advantage by being on the record of this suit at all, and therefore must not be allowed to contest the plaintiffs' claim. We think that the whole of that reasoning is erroneous, as we have shown.

But even assuming for a moment that there may have been some fiduciary relation, constructive probably, if at all, between Bechar and the plaintiffs, and supposing that that has been used so as to bring defendant 2 upon the record, we should still have to ask ourselves whether in the very definite issue between himself and the plaintiffs, he has gained any advantage whatever. Speaking for myself again, I should doubt it. It is quite true that had this been a mortgage suit, and nothing more (whereas in form it is a suit in ejectment and nothing more), a person claiming by title paramount both to mortgagor and mortgagee finds no place in such a suit. But in a suit in ejectment it may be doubted whether the plaintiff could fairly say that the

defendant's position is not stronger here than it would have been had the defendant 1 been no more than a transferee since 1906, and gone out of possession and let the defendant 2 in. There is a very definite issue to be tried between defendant 2 and the plaintiffs, and whether it were tried in this or another suit, I cannot see that the de facto possession of the one or the other party would be of the least advantage in obtaining a determination of that issue. Defendant 2 comes in as an adopted son claiming to divest from the moment of his adoption the widow's estate, and therefore to challenge all alienations made by her. Now the plaintiffs admittedly were not in possession of the property which they sue to recover as mortgagors. They are met by the adopted son claiming to be in possession, and the most that the plaintiffs could say, as far as I can see, would be that but for defendant 2 having been let into possession by defendant 1, he could not have appeared in this suit at all. Then at any rate he would have appeared very shortly in another suit, and there could be no question of limitation in the matter, so the issue raised would again have been raised there, and as I said just now, the de facto possession of one or the other party would have been entirely irrelevant, and certainly could not have given a party so placed any advantage over the other.

Divesting, by an after-made adoption, estate which had in the meantime vested, is a question we should have had to consider had we found that the award of 1893 was a true acceleration. It came in for a good deal of discussion in the course of the argument, and I should like to make one or two observations upon it. Courts usually answer it uniformly and with much confidence, it may indeed be regarded as settled law that a subsequent adoption will not divest estates vested before it was made. And the question often takes the awkward and inexact form of whether a given adoption is a valid adoption to the property of the deceased adoptive father. Such a case as that of an acceleration first taking place, and then the widow adopting, has we believe never formed the subject of judicial decision. The point of difficulty is to find any single, clear and uniform principle upo

which (a) to rest the law commonly favoured in the Courts where it is a case of after-adoption, and (b) to distinguish such a case from that of a posthumous natural son. In the latter case, it could only be on the assumption that his rights arise upon his conception, that he could be put upon a different footing from an after-adopted son. But I doubt whether that ground can be justified in the Hindu law proper. Suppose a Hindu begets a son and dies next day. What difference in principle can there be between his case, and that of a son adopted exactly nine months after the death of the adoptive father? The rule in the *Tagore* case [*Jotindra Mohan Tagore v. Ganendra Mohan Tagore* (6)] puts after-adopted and posthumous natural sons on the same footing as donees, and exactly the same principle would, it is submitted, have to be applied to cases of the kind we have in view. Reasoning to be found in some of the reported cases against allowing an after-adopted son to divest estates vested in the meantime, will not do. There we find it said that the true reason is that until a widow does adopt no one can say whether she will or not. But it is as true to say that a widow left pregnant cannot say, nor can any one say, whether she will give birth to a child at all, or if she does, whether that child will be a son.

A son adopted 15 years after his adoptive father's death would certainly not be allowed to divest estates which during that period might have vested more than once in others. But a posthumous son born a week after his father's death, almost certainly would. Yet a very little reflection will show that the element of time has really nothing to do with the operation of any uniform principle rightly applicable to all cases of the kind. Nor upon a rigorous analysis is it easy to discover any ground upon which to distinguish the case of an after-adopted from that of an after-born son.

Holding as we do that there has been no acceleration here, it amounts to this and no more than that there has been an alienation of two thirds of the property to reversioners, and we are unable to draw any distinction between an alienation to a reversioner and an aliena-

tion to a third person. If the alienation be in any true sense an alienation, then it must be governed by the general law which requires for the validation of all such alienations legal necessity, and we have already, we think, given sufficient reasons for holding that in this case legal necessity cannot be said even to be alleged, much less proved, while the doctrine of acceleration will not assist the plaintiffs. The conclusion we have come to upon the whole case is that defendant 2, appellant here, is entitled to resist the plaintiffs' claim as the adopted son, that he is entitled to allege that the widow's alienation of 1893 under the award was not for legal necessity, and as such became void against him at the moment of his adoption. He is therefore now, in our opinion, entitled to have that alienation set aside in his favour. We must therefore allow the appeal and dismiss the plaintiffs' claim with all costs.

Heaton, J.—I agree in the conclusions arrived at. I feel no doubt whatever in my own mind that this is not a case of acceleration. In the case referred to, viz. *Behari Lal v. Madho Lal Ahir Gayawal* (2), in the judgment of the Privy Council, it is said:

"It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances."

That clearly brings out the idea that for an acceleration there must be an absolute annihilation of the widow's interest, as complete as if she were dead. In this case it seems to me from the terms of the award that there was no annihilation of the widow's interest. Far from that there was a securing to her of a life-interest of about a third of the entire estate, and to regard that as an acceleration seems to me the same as allowing to be done by means of a trick or device that which is forbidden by law. Having once arrived at the conclusion that there is no acceleration, we simply have to deal with an alienation. That, I entirely agree, is something different from, and antagonistic to, an acceleration. Having only an alienation to deal with, we have the very common case of an adopted son seeking to set aside an alienation made by his adoptive mother before the adoption, and

when it is admitted, as it is in this case, that there was no necessity for the alienation, that alienation can be set aside. I also think that the circumstances of the case show that there is nothing in equity which should prevent us from dealing with the defence set up by defendant 2 and deciding the case on that defence if it is made good, as in this case it has been made good.

It seems to me quite wrong to describe what has happened as a fraud which has been participated in not by defendant 2 himself, for he is a minor, but by his guardian. It is perfectly true that from a certain point of view there might appear some degree of meanness about the line of conduct which defendant 1, Bechar, the natural father of the adopted boy has pursued. Failing to get what he considered his rights by any other means, he adopted the expedient of giving his son in adoption to Raiji's widow, Lala. But, however mean a transaction this may appear to be, it is perfectly legal. The adoption is a perfectly good adoption, and converts defendant 2 into the son of Raiji with the rights of a son. So long as the thing is legal, I cannot see that to resort to it as a means of asserting one's rights can be termed a fraud. There is also another point of view. If one were to analyse the conduct of the different parties who have taken part in this long series of transactions, the litigation, the devices, the delays, the refusal for years to give effect to the award which had been assented to by all, it seems to me that it is drawing very fine distinctions to single out any one particular party and describe his conduct as fraudulent in comparison with that of the others. For these reasons, and others which my learned colleague has stated much more fully and analytically, I agree in the decree which has been ordered.

G.P./R.K. *Appeal allowed.*

A. I. R. 1916 Bombay 95

SCOTT, C. J. AND HEATON, J.

Gangaram Ganapati Bhopale — Appellant.

v.

Laxman Ganoba Shet — Respondent.

Second Appeal No. 151 of 1915, Decided on 15th March 1916, from decision of First Class Sub-Judge, Nasik, in Appeal No. 228 of 1913.

Transfer of Property Act (1882), S. 55—Sale — Possession transferred on part payment of purchase-money — Subsequent purchaser, with notice, even by registered deed cannot profit by his conveyance.

Defendant contracted to purchase certain property from N. On payment of half of the purchase-money he was put in possession of the property and the other half of the purchase-money was agreed to be paid after execution of the sale deed. N subsequently sold the property by a registered deed to plaintiff, who purchased it with notice of the contract with defendant. On a suit by plaintiff for possession :

Held : that plaintiff could not profit by his conveyance and that his suit was not maintainable.

Held also : that plaintiff could only stand in the shoes of N and receive the balance of the purchase-money due, on payment of which he was to bound convey the property to the defendant. [P 96 C 1]

Quære.—Whether a defendant who contracts to purchase a certain property and pays a portion of the purchase-money has no defence against a suit by his vendor for possession : 28 Bom 466 and 29 Mad 336, Doubtful. [P 96 C 1]

K. H. Kelkar—for Appellant.

W. B. Pradhan—for Respondent.

Judgment. — The plaintiff sued for a declaration that a certain immovable property belonged to him and for a decree that possession of the same should be delivered to him by the defendant. He bases his title upon a purchase of the properties in question from Narayan Ganpati on 5th December 1911. It has been held by the lower appellate Court that prior to this date the plaintiff had notice of the execution of a contract for the sale of the same property by Narayan to the defendant. The defendant contends that he has paid to Narayan portion of the purchase-money agreed upon and that the balance was to be paid after the sale deed was passed. It is found by the lower appellate Court that nearly half of the purchase-money was in fact received by Narayan from the defendant under the contract of sale. The question is whether the defendant has a good defence to a suit by a purchaser from Narayan who can rely upon a registered sale deed and whether he can, notwithstanding the sale deed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract.

The defendant's right to enforce the benefit of the obligation of his intended vendor against the purchaser with notice is expressly affirmed by S. 40, T. P. Act, as explained by the illustration. The plaintiff is moreover ac-

according to the Specific Relief Act, S. 3, a trustee for the defendant of the land purchased by him : see *Illus. (g)*. S. 91, Trusts Act, affirms the same rule as the Specific Relief Act. The legislature has herein adopted the law applied in the cases of *Daniels v. Davison* (1) and *Potter v. Sanders* (2). It is not contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase, the defendant had any notice that the vendor would refuse performance. Therefore at the date of the plaintiff's suit, namely, 16th April 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation. It must not be taken from the above remarks that the defendant would be in a worse position in relation to the plaintiff if at the date of suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying upon his possession. In this connexion reference may be made to *Orr v. Sundra Pandia* (3); *Krishna Menon v. Kesavan* (4) and *Ranganath Sakharam v. Govind Narasim* (5).

The result is that the plaintiff cannot profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase money due, on payment of which he would have to convey to the defendant. This however is not the relief which he seeks, and the result is that his suit for possession must fail. This decision may appear to be inconsistent with the result arrived at in *Lalchand Motiram v. Lakshman Sahadu* (6) and in *Kurri Veerareddi v. Kurri Bapireddi* (7), from which, if rightly decided, it would appear that the defendant would have no defence against a suit by his vendor for possession, although by reason of the statutory provisions above referred to, he has a complete defence against his vendor's

assignee, notwithstanding that the latter has no greater knowledge than the vendor possessed. It may be necessary hereafter, when a suitable occasion arises, to consider in a Full Bench, whether the Transfer of Property Act necessarily involves such inconsistent positions. The facts of the present case do not raise the question decided in *Lalchand Motiram v. Lakshman Sahadu* (6). When the question does arise for consideration, the observations of the Privy Council in *Immadipattam Thirugnana Kondama Naik v. Periya Dorasami* (8) and the words "of itself" in the last clause of S. 54, T. P. Act, to which attention was called by Sir Lawrence Jenkins in *Karalia Nanubhai v. Mansukhram* (9) will doubtless be considered.

G.P./R.K. *Appeal accepted.*

8. (1901) 24 Mad 377=28 I A 46 (PC).

9. (1900) 24 Bom 400.

A. I. R. 1916 Bombay 96

BACHELOR AND SHAH, JJ.

Emperor

v.

Chhaba Dolsang—Accused.

Criminal Review No. 259 of 1916, Decided on 23rd November 1916, from order of Resident Magistrate, First Class, Borsad.

Criminal P. C. (1898), S. 250—Scope—It does not apply to offences triable solely by Court of Sessions.

Section 250, Criminal P. C., applies only to cases of offences triable by a Magistrate, and not to a case where the accused is charged with an offence triable exclusively by a Court of Session.

T. R. Desai--for Complainant.

Judgment.--The Rule must be made absolute and the order awarding compensation to the accused under S. 250 must be set aside. The sum, if it has been paid, must be refunded. The reason is that S. 250, Criminal P. C., applies only to a case where a person is accused before a Magistrate of any offence triable by a Magistrate, and here the person accused was accused of an offence under S. 436, I. P. C., which is not triable by a Magistrate, but is triable exclusively by a Court of Session.

G.P./R.K.

Order set aside.

1. (1809) 16 Ves 249=10 R R 17.

2. (1846) 6 Hare 1=67 E R 1057.

3. (1894) 17 Mad 255.

4. (1897) 20 Mad 305.

5. (1904) 28 Bom 639.

6. (1904) 28 Bom 466.

7. (1906) 29 Mad 336.

A. I. R. 1916 Bombay 97

BATCHELOR AND SHAH, JJ.

Bai Ganga—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 363 of 1916, Decided on 1st November 1916, from convictions and sentences of Sess. Judge, Surat, in Sess. Case No. 19 of 1916.

Penal Code (45 of 1860), S. 494 — Caste cannot dissolve marriage and permit married woman to re-marry—Court cannot recognize such authority — Remarriage permitted by panchayat or husband not being heard for more than eight years and was held to constitute offence.

Courts do not recognize the authority of a caste to dissolve a marriage or to declare it void or give permission to a married woman to re-marry. [P 97 C 2]

Where therefore the accused's marriage was, in accordance with a custom prevailing in her caste, dissolved by a caste panchayat in consequence of her husband having gone abroad and his whereabouts being unknown for eight years during which period accused was left unprovided for, and the accused, on the strength of such decision, re-married during the lifetime of her husband :

Held : that the decision of the panchayat was inoperative in law and the re-marriage of accused fell within the prohibition of S. 494, I. P. C. : 1 Bom 347 and 39 Bom 538, *Ref.* [P 97 C 2]

Strangman and *T. R. Desai* — for Accused.

S. S. Patkar—for the Crown.

Batchelor, J.—The appellants in this case have been convicted under S. 494, I. P. C., which provides punishment for marrying again during the lifetime of a husband in all cases where such marriage is void by reason of its taking place during the lifetime of such husband. The facts upon which the conviction has proceeded are not disputed and are these : Accused 1 Ganga was married to the complainant about 18 years ago, she then being about six years old and the complainant being about nine. The marriage was not consummated and shortly after it the complainant proceeded to Kimberly in South Africa for the purpose of earning his livelihood. During his absence there, though he did write to his own uncle, it appears that he did not communicate with his wife Ganga; nor did he furnish her with maintenance. Ultimately in the absence of the husband a fargati was obtained by the caste, who took a sum of Rs. 110 from accused 3 and the palla ornaments. Upon the faith of this fargati accused 1 re-married with

accused 2 on 6th June 1916. Four days later the original husband returned from Kimberly. The only question is whether the second marriage was void by reason of its taking place during the lifetime of the first husband, the complainant.

No doubt, as Mr. Strangman has urged, the circumstances appearing in this particular case seem at first sight to be rather stronger in the wife's favour than the circumstances which underlay the custom sought to be set up in other cases which this Court has had to consider, as, for instance, the custom alleged in *Reg. v. Karsan Goja* and *Reg. v. Bai Rupa* (1). It appears to me however that it is inexpedient to examine with any great nicety the particular form of custom which may be alleged in any particular case, and that it is expedient to abide by the general principle which this Court has long since adopted and consistently followed. That principle was stated in *Reg. v. Sambhu Raghu* (2), so far back as 1876, and in that case a Bench of this Court said :

"The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry."

That principle, thus announced in 1876, was reiterated by another decision of this Court in 1915 : see *Keshav Hargovan v. Bai Gandi* (3). To that principle I think that we should still adhere. And the result is that, the panch having no authority to grant the fargati which they did grant, that fargati is inoperative and the original marriage between Ganga and the complainant remained undissolved and in full force. That being so, the subsequent marriage between accused 1 and 2 falls within the prohibition of S. 494 of the Code and the conviction must be confirmed. At the same time having regard to the position of the parties and the possibility that they believed that they would be legally justified in acting upon the authority which the panch arrogated to itself, we think the sentence may be reduced and we do reduce it to that which the appellants have actually suffered.

Shah, J.—I am of the same opinion.

G.P./R.K.

Sentence reduced.

1. (1864-66) 2 B H C R 117.

2. (1875-77) 1 Bom 347.

3. (1915) 39 Bom 538=29 I C 952.

A. I. R. 1916 Bombay 98 (1)

BEAMAN AND HEATON, JJ.

Manamad Nathu and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 176 of 1916, Decided on 7th September 1916, against conviction and sentence passed by City Magistrate, First Class, Ahmedabad.

Bombay Prevention of Gambling Act (1887), S. 12—Playing cards for insignificant stakes — Offence is trivial and warning or small fine is sufficient sentence.

Accused, who were peons and mill-hands, were convicted by a Magistrate for gambling in that they played cards for very insignificant stakes on a hot afternoon under the cool shades of a masjid and were sentenced to 15 days imprisonment each :

Held : that the offence was very trivial and the sentence inflicted grossly disproportionate and that a warning or a small fine would have answered the ends of justice. [P 98 C 1]

T. R. Desai—for Applicants.

S. S. Patkar—for the Crown.

Judgment. — We think it a pity that the gambling laws, through the injudicious activity of the police and want of discretion on the part of the Magistracy, should sometimes be worked so harshly as they have been in this case. Without going into a discussion of the points raised by the learned counsel for the applicants, it will be sufficient to say that every feature of the case convinces us that it was of the most trifling character and one which might have been passed over by the police with a caution or, if brought before the Magistrate, dealt with by him in a very different way from that in which he has dealt with these offenders.

They are peons and mill-hands, and on a hot afternoon betook themselves to the cool shades of the Daskroi Masjid where, adopting the Magistrate's finding of fact, they were amusing themselves by playing cards for very insignificant stakes. The police raided the place and dragged nine of these persons before the Magistrate, who convicted five of them and actually sentenced them to 15 days' imprisonment. Such a sentence in such circumstances appears to us to be monstrous and altogether out of proportion to the criminality of the acts charged. If the police had thought it worthwhile to bring such persons before a Magistrate on such charges, we should have thought that the Magistrate would have seen

that this was no serious matter, and if he had felt it necessary upon the evidence to convict the accused persons at all, he would have let them go with a small fine. Unfortunately they appear to have undergone seven days' imprisonment before they were released on bail by this High Court. We therefore now remit the unexpired portion of the sentence. We do not interfere with the conviction, because in the circumstances there is no occasion for us to do so.

G.P./R.K.

*Sentence remitted.***A. I. R. 1916 Bombay 98 (2)**

BATCHELOR AND SHAH, JJ.

Bhagava Giriappa and others—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 373 of 1916, Decided on 1st November 1916, from conviction and sentence of Sess. Judge, Bijapur, in Session Case No. 27 of 1916.

Penal Code (45 of 1860), Ss. 307 and 337—Administering of injurious drug to induce love in ignorance of the dangerous nature and without care or inquiry as to its amounts to offence under S. 337 and not S. 307—Held further, persons supplying the drug knowing it to be dangerous are guilty of offences under Ss. 307/109 and 328/109.

The administering of an injurious drug or potion to a person to induce love in ignorance of its nature or effect and without care and caution and inquiry as to its properties, which causes serious illness to such person, amounts to an offence under S. 337, I. P. C., and not under S. 307. [P 99 C 1]

Accused 1 got a potion from accused 2, her lover and administered it to her husband to make him less quarrelsome towards her. Accused 2 and 3 prepared the potion, knowing that it contained dhatura:

Held: that the act of accused 1 amounted to an offence under S. 337, I. P. C., and the acts of accused 2 and 3 under Ss. 307 and 109, 328 and 109, respectively: 39 Cal 855; A I R 1915 Bom 297 and 7 M H C R 119, Ref. [P 99 C 1]

S. S. Patkar—for the Crown.

Judgment.—In this case there is no appearance on behalf of the appellants, but we have heard the Government Pleader for the Crown. Appellant 1 was the wife of one Giriappa, but was in illicit relations with accused 2, Mohidin. Appellant 3, Irrappa was a go-between. They have been convicted of attempting to murder or abetting the attempt to murder Giriappa, the husband of appellant 1, whom the appellant, injured by mixing dhatura with his food, having received this dhatura from accuseds 2 and 3. The evidence leaves no doubt as

to the guilt of the accuseds 2 and 3, who have properly been convicted of the abetment of the attempt to murder. But the sentences passed upon them seem to us to be excessive. We reduce the sentences in each case to five years' rigorous imprisonment under Ss. 307 and 109, 328 and 109, the sentences to be concurrent. As to the wife, accused 1, the question is one of more difficulty, and on the whole we are not satisfied that she can safely be convicted of the attempt to murder. It is not shown that she knew that the stuff given to her by accuseds 2 and 3 for administration to her husband was dhatura.

The evidence rather suggests that what she asked for was some potion which would save her from the quarrelsome tongue of her husband, and that what she received from accuseds 2 and 3 was received as a potion likely to produce this and no worse effect. It is clear, however, that in administering to her husband an unknown powder which she received from her lover who was at enmity with her husband, and in administering it to her husband, without any care or caution or any inquiry as to its properties, she committed an offence punishable under S. 337, I. P. C. This view of the nature of her act is supported by the decisions in *Pika Bewa v. Emperor* (1) and *Emperor v. Ramava Chennappa* (2). Reference may also be made to the case of *In re, Nidamarti Naghabhushanam* (3), where there will be found a very complete explanation of this and related provisions of the Penal Code. We alter the conviction of the accused 1 to a conviction under S. 337, I. P. C., and reduce her sentence to one of six months' rigorous imprisonment.

G.P./R.K.	Sentences reduced.
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| 1. (1912) 39 Cal 855=14 I C 195. | |
| 2. A I R 1915 Bom 297=28 I C 641. | |
| 3. (1871-74) 7 H H C R 119. | |

A. I. R. 1916 Bombay 99

BATCHELOR AND SHAH, JJ.

Kashinath Vinayak Bhare — Plaintiff — Applicant.

v.

Rama Daji Kale — Defendant — Opposite Party.

Civil Ref. No. 1 of 1916, Decided on 28th February 1916, made by Dist. Judge, Ahmednagar.

Dekkhan Agriculturist Relief Act (1879), S. 15 (b) (1)—Default in payment of instal-

ments—Sale of portion of mortgaged property—Final decree—Application for under O. 34, R. 5 (2) is not necessary — Civil P. C. (1908), O. 34, R. 5 (2).

A holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under S. 15 (b) (1), Dekkhan Agriculturist's Relief Act, is not required to apply under O. 34, R. 5 (2), Civil P. C., 1908, to make the decree final before he can apply for sale of the necessary portion of the property under S. 65 (b) (2), Dekkhan Agriculturist's Relief Act. [P 99 C 2]

W. B. Pradhan (*amicus curiae*) — for Applicant.

A. G. Desai (*amicus curiae*) — for Opposite Party.

Judgment.—We are obliged to the learned pleaders who, as amici curiae, have assisted us with their arguments in this case. This is a reference under O. 46, R. 1, from the learned District Judge of Ahmednagar, and the question, which is propounded to this Court, is in the learned Judge's words: whether a holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under S. 15 (b) (1), Dekkhan Agriculturists' Relief Act, must apply under O. 34, R. 5, Civil P. C., to make the decree final before he can apply for sale of the necessary portion of the property under S. 15 (b) (2), Dekkhan Agriculturists' Relief Act. In my opinion the answer should be in the negative.

It is true that by S. 74, Dekkhan Agriculturists' Relief Act, it is provided that, except in so far as the Civil Procedure Code is inconsistent with that Act, the Code shall apply in all suits and proceedings before Subordinate Judges under that Act. But, as it seems to me, the kinds of procedure laid down by the Civil Procedure Code and the Dekkhan Agriculturists' Relief Act respectively in the matter of sales in mortgage suits are inconsistent one with the other. By Rr. 4 and 5, O. 34 of the Code, a plaintiff-mortgagee must obtain both a preliminary decree for sale and upon his separate application a final decree for sale before the mortgaged property or sufficient part thereof can be sold. But S. 15 (b), sub-Ss. 1 and 2, Dekkhan Agriculturists' Relief Act, which provide for the sale of mortgaged property under that Act, contain, as I read them, materially different provisions. Sub-S. 1 of the section empowers the Court, in its discretion in making a decree for sale, to direct that the amount payable by

the mortgagor under the decree shall be payable in instalments, and sub S. 2, which is the important provision, is in these words:

"If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing . . . order the sale of such portion only of the property as it may think necessary for the realization of that sum."

It is necessary to contend on behalf of the judgment debtor, and accordingly it has been contended, that the words which I have read mean no more than that the Court shall make a decree directing that in default of payment of the instalment the mortgaged property or a sufficient part thereof shall be sold. But the words which I have cited do not say that: they say a great deal more than that, and, as I think, must be taken to mean what they say, that is, that the Court shall make an out-and-out order for sale; nor is there anything in the Dekkhan Agriculturists' Relief Act to suggest that anything more than this order is required for the purpose of bringing the property to actual sale. Although, as Mr. Desai has urged, the general scheme of the Dekkhan Agriculturists' Relief Act is to assist or favour the indebted defendant, I can see nothing repugnant in the construction which I have put upon the words of S. 15 (b). For, the scheme of this section, making special allowance for instalments and requiring that only a portion of the mortgaged property shall be sold, seems to me to differ entirely from the general scheme of O. 34, Civil P. C. Under the Dekkhan Agriculturists' Relief Act the mortgagor is favoured in these two respects, that he is enabled to make easy payments and that only a sufficient portion of his property is sold on the failure to pay any instalments. I see no difficulty in holding that that is the limit of the concessions which the legislature was making in his behalf, and in my view neither the principle of those concessions nor the words of the statute suggest that the intention was that, on the failure to pay each particular instalment, the mortgagee would not only have to obtain a definite order under sub-S. 2, S. 15 (b), but would also have to follow it up at some later period by making a fresh application in each case and obtaining from the Court a fresh order. I am of opinion that the order

made by the Court under sub-S. 2 is the order contemplated by the legislature as effecting without more the sale of the requisite portion of the property.

Shah, J.—I agree.

G.P./R.K. *Answered accordingly.*

A. I. R. 1916 Bombay 100

SCOTT, C. J. AND HEATON, J.

Hari Ganu Bhagade and others—Defendants—Appellants.

v.

Gangadhar Vithal Gulvani and others—Plaintiffs—Respondents.

Second Appeal No. 1013 of 1914, Decided on 17th February 1916, from decision of First Class Sub-Judge, Thana, in Appeal No. 77 of 1914.

Khoti Lands—Kolaba District — Transfer without permission of Khot works as forfeiture and Khot can enter to prejudice of transferee.

An alienation by a khoti tenant of his khoti lands without the permission of his khot in the Kolaba District works as a forfeiture and the khot is entitled upon such transfer to enter upon the land to the prejudice of the transferee: 13 BLR 273, Ref. [P 100 C 2; P 101 C 1]

K. H. Kelkar and M. N. Karbhari—for Appellants.

V. B. Virkar—for Respondents.

Judgment.—The plaintiffs sue to recover possession of certain lands in the Kolaba District, on the ground that they were entitled so to do by reason of their occupancy tenants having assigned those lands to other persons without permission of the plaintiffs, who were the khots. The learned trial Judge has cited a number of decisions, which establish that alienation by a khoti tenant of his khoti lands in the Kolaba District works as a forfeiture. The lower appellate Court, accepting that custom as established, discusses a counter-custom set up by the defendants to the effect that khoti tenants were entitled to transfer their holdings, and he holds the custom is not proved. The learned pleader for the appellants argues that although the custom may be established that a khoti tenant cannot transfer his occupancy holding without the permission of his khot, it does not follow that the khot can upon such transfer enter upon the land to the prejudice of the transferee. It may be that the expression "forfeiture" is inappropriate to the consequences which result from an unauthorized transfer of an occupancy holding, but the result must be that the khot is enti-

tled to re-enter for the reasons stated by Sir Richard Couch in the analogous case in Bengal of the zamindar and his occupancy tenants. In *Narendra Narayan Roy Chowdhry v. Ishan Chandra Sen* (1) the learned Chief Justice says :

" If a raiyat having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the zamindar from recovering the possession from the person who claims under the transfer."

That decision was applied by a Bench of this Court to the case of an unauthorized sale of land by a khoti tenant : see *Nagardas Sobhagyadas v. Ganu Balu* (2). The remedy appears to be appropriate, even if it be taken that prior to the passing of the Khoti Act of 1880, no khot was anything more than a farmer of revenue, for he was under an obligation to pay a certain revenue to Government, and if the occupancy tenant, to whom he looked to render his share of the revenue, transferred the land to some one whom the khot did not approve of, the remedy of the khot would be to go on to the land and collect the produce for himself so as to be able to discharge his obligations to Government. The finding however of custom in favour of the plaintiffs does not dispose of the case, because the receipt book shows that the transferees have paid khoti profits to the khot which have been accepted. The contention of the defendants in appeal to the lower appellate Court was that they had paid dhara and fayda since 1897, and the plaintiffs knew of their possession under the transfer, but accepted the dhara and fayda at their hands, and therefore had indirectly consented to the alienations, and had no right to maintain the suit. The learned trial Judge disposed of that point by saying that the fact of plaintiffs' knowledge of the transfers was not proved by the defendants. The learned Judge with appellate powers however notwithstanding the reference to the point in the judgment of the trial Judge, says :

" The appellant did not urge in the Court below that the plaintiff knew of the alienation to him, and it is now too late to urge that plea."

He appears to have overlooked the reference to the point in the judgment of

the lower Court. But it is necessary for the decision of the case that that point should be decided. We must therefore remand to the lower appellate Court for decision of the issues—When the plaintiffs first knew of the alienations by the khoti tenants to the other defendants, and whether with such knowledge they accepted payment of dhara or fayda from the transferees, and whether such conduct amounts to a waiver of forfeiture or ratification of the transfer? The finding to be returned within one month. No further evidence to be taken.

G.P./R.K.

Issues remanded.

A. I. R. 1916 Bombay 101

BATCHELOR, AG. C. J. AND SHAH, J.

Rose D'Souza and others—Plaintiffs—Appellants.

v.

Joseph Joaquim Serpes and others—Defendants—Respondents.

First Appeal No. 226 of 1915, Decided on 30th August 1916, from decision of First Class Sub-Judge, Thana, in Suit No. 250 of 1914.

(a) **Deed—Construction—Documents in India should not be construed literally—Intention should be looked to.**

In dealing with deeds and contracts of the people of India, Courts should have regard, not so much to the form of expression or the literal sense, as the real meaning of the parties which the transaction discloses. The intention must be gathered from the words used and cannot be supplied by the Courts independently of the words used. [P 102 C 2]

(b) **Will—Construction—Words conferring absolute estate used with words limiting that right—It must be read as whole—Testator should not be bound to earlier words—Will was construed to confer life interest.**

Where a testator, in devising property, uses words of absolute import in the earlier part of the will and the same is immediately followed by limiting words occurring in the same sentence, it will be unreasonable to tie down the testator to the earlier words and effect must be given to the will read as a whole. [P 102 C 2]

A will was in terms as follows : "I appoint by this testament my brother Joaquim Serpes as my only and universal heir of all the immovable property which I possess, and which may hereafter in any manner belong to me, with the strict obligation to him not to sell, exchange or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children, preserving the same as a patrimony of the house."

Held : that the beneficiary took under it only a life-interest: 6 MIA 393 (PC), Ref. [P 103 C 1]

Jardine and Solomon Moses—for Appellants.

Strangman, Coyaji and K. A. Padhye—for Respondents.

1. (1874) 13 BLR 274.

2. (1891) PJ 107.

Batchelor, Ag. C. J.—The state of facts in which this appeal is brought is described in the judgment of the lower Court and need not be recapitulated. Only three points are taken on behalf of the appellants, who are the original plaintiffs, and of these three points only one is, I think, such as to occasion any difficulty. The first objection raised for the appellants was that Probate of the will of Joseph had not been established. But that objection is, in my opinion, disposed of by Ex. 25, an extract from a vernacular register for the year 1877. That extract shows that application for Probate was made to the Court, and that the Court granted what is translated from the vernacular as a "certificate." Seeing that the application was for Probate, and that the English word "certificate" is habitually used in the vernacular languages as equivalent to "Probate," I have no doubt that the Probate of Joseph's will in this case is sufficiently proved. As to the second point that the property in suit was not identified as the property referred to in the will of Joseph, the answer is that that point cannot be taken now. No issue was raised upon it in the Trial Court, and, so far as the record shows, it appears that until the evidence in the case was completed, the defendants had no notice that they would have to meet any such objection. The third point is, as I have said, more serious and requires more consideration. It turns upon the construction of a passage occurring in the will of Joseph. The question to be determined is whether upon a proper construction of this will Joaquim was merely a life tenant or whether he took absolutely. The relevant passage in the will is in these words :

"I appoint by this testament my brother Joaquim Serpes as my only and universal heir of all the immovable property which I possess, and which may hereafter in any manner belong to me, with the strict obligation to him not to sell, exchange, or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children, preserving the same as a patrimony of the house."

It is urged by the learned Advocate-General on behalf of the appellants that the earlier words in this passage, constituting Joaquim the only and universal heir, are words of absolute grant, and are not to be cut down by the subsequent words which are merely repugnant to

the grant already made. That no doubt is a good argument if the earlier words are words of such power or even of such magic that when once they have been uttered by a testator, it is impossible to look any further for the manifestation of his intention. But the rule is to have regard to the whole will in order to see what the testator's intentions were, and, in *Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree* (1), the Courts in India have been particularly cautioned that in dealing with deeds and contracts of the peoples of India, they are to have regard, not so much to the form of expression or the literal sense, as to the real meaning of the parties which the transaction discloses. It is of course nonetheless the fact that the intention must be gathered from the words used, and cannot be supplied by the Court independently of the words used. Now it appears to me important to notice first of all that though this will must be interpreted by the principles of English Law, it is drawn in the Portuguese language and clearly without any reference to English legal notions. This is apparent, as I think, on the face of the document, and in one part of it finds expression by the testator himself who says :

"I beg Her Majesty's Court to cause this my testament to be made valid in the best manner and form that the law requires,"

in other words, it seems to me that this Portuguese gentleman, writing in his own language, without any knowledge of the doctrines of English Law, expressly invokes the aid of the Court to validate that which, by the language he has used, shall appear to the Court to have been his wish and intention. Now reading as a whole the sentence in which the disputed words occur, I have never been able to doubt what the wish and intention of this gentleman were; and seeing that both the apparently absolute words and the limiting words occur in one and the same sentence, I think it would be unreasonable to tie down the testator to the earlier words as if he had never given any further explanation of the intention which at that moment was in his mind. In my opinion he has in this one sentence supplied his own dictionary, and the fairest way in which the whole

1. (1872) 18 W R 81n=6 M I A 393.

sentence can be read is to read it as if the words were:

"I appoint my brother as my only and universal heir of all the immovable property, and by that I mean that he is not to sell or exchange it, but only to enjoy a life-estate."

I may observe that the words translated "obligation" represents in the Portuguese the same original Latin word, and it is not, in my opinion, possible to contend that the testator, after having given an absolute estate, was merely adding a prayer or request that the beneficiary should act towards it in a certain manner. For these reasons, construing this particular will from the language employed in it, and doing my best from that language to ascertain and carry out what appears to me to have been the clear intention of the testator, I am of opinion that the lower Court's view upon this point was right. The appeal therefore fails and should be dismissed with costs.

Shah, J.—I am of the same opinion.
G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 103

BATCHELOR, Ag. C. J. AND SHAH, J.
Laxminarayan Ramdayal and others
—Plaintiffs—Appellants.

v.

Chimniram Girdharilal and others—
Defendants—Respondents.

Second Appeal No. 453 of 1915, Decided on 8th September 1916, from decision of Dist. Judge, Ahmednagar, in Appeal No. 122 of 1914.

(a) Civil P. C. (1908), O. 8, Rr. 3, 4 and 5—Scope and object of—They are to introduce practice of pleadings in England.

Rules 3, 4 and 5, O. 8, Civil P. C., are intended to bring the Indian practice as to pleadings into a position approaching that which obtains in England. [P 103 C 2]

(b) Civil P. C. (1908), O. 8, Rr. 3, 4 and 5—Fact not specifically and expressly denied must be taken to be admitted.

In a suit for money on accounts the plaintiff set forth that, by reason of a letter of the defendant, the suit was within time. The replication to this in the written statement was that the suit was not saved by the letter put in from the bar of limitation :

Held : that the statement could not be read either as a specific denial or denial by necessary implication of the execution of the letter upon which the plaintiffs expressly relied, and that the letter must, under O. 8, Rr. 3, 4 and 5, Civil P. C., be taken as admitted between the parties. [P 104 C 1]

V. B. Virkar—for Appellants.

D. C. Virkar—for Respondents.

Judgment.—In this appeal the only

question which it is necessary to consider is the question whether the letter, Ex. 33, ought to be held to have been admitted. For if Ex. 33 is held to be admitted, then it is clear that the plaintiffs' suit is not exposed to the bar of limitation. Now the suit was brought to recover a sum of money on an account stated, and with regard to the question of limitation, the matter was put by the plaintiffs in the following language, in paras. 4 and 5 of their plaint :

"As mentioned in the special extracts the defendants have given the vasul in respect of the dealings and, at last, have sent a vasul of Rs. 100 on 13th May 1910 and the defendants sent their firm's letter to the plaintiffs, dated 12th May 1910, mentioning that vasul. This suit of the plaintiffs is filed after three years subsequent to the date of the last transaction. But the plaintiffs' suit is in time on account of the vasul given by the defendants and on account of the letter referred to in Cl. 4."

This letter thus referred to is Ex. 33. In reply to this averment in the plaint the defendants in their written statement, Ex. 14, state as follows :

"Paragraph 6 : The plaintiff's suit is not in time. The suit is not saved by the letter put in from the bar of limitation."

In this state of the pleadings, the learned Subordinate Judge of trial came to the conclusion that the letter, Ex. 33, must be accepted as proved, and in that conclusion we think he was justified under the provisions of Rr. 3, 4 and 5, O. 8, Civil P. C. These are new provisions intended, it must be supposed, to bring the Indian practice as to pleadings into a position approaching that which they occupy in England. R. 5 is, for instance, substantially the same provision as obtains in England, except that its rigour is mitigated by the added proviso. With that proviso however in this particular case we have no concern, and the rule which we have to enforce lays down that

"every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted."

In this case the words which we have cited from para. 6 of the written statement seem to us incapable of being read as containing either a specific denial or a denial by necessary implication of the execution of the letter upon which the plaintiffs have expressly relied. It appears to us that, on a fair reading of para. 6, its meaning is that though the letter put in by the plaintiffs is not

denied, the defendants contend that for one reason or another its effect is not to save the suit from the bar of limitation. We think therefore that under Rr. 3, 4 and 5, O. 8, Civil P. C., the lower Court was right in thinking that in this state of the pleadings, the letter Ex. 33 must be accepted as admitted between the parties, and therefore unnecessary to be proved. This being so, the lower appellate Court's decree dismissing the suit on the ground of limitation is reversed and the decree of the trial Judge restored with costs throughout.

G.P./R.K.

*Appeal allowed.***A. I. R. 1916 Bombay 104**

SCOTT, C. J. AND HEATON, J.

Tavakalbhai Sultanbhai — Defendant
— Appellant.

v.

Imtiyajbegam Mirabanesaheb — Plaintiff — Respondent.

Second Appeal No. 955 of 1915, Decided on 21st November 1916, from decision of Dist. Judge, Ahmednagar, in Appeal No. 43 of 1915.

Mahomedan Law—Gift—Conditional validity—Acceptance of conditional gift makes condition enforceable not only against donee but persons claiming under him with notice—It is in nature of trust.

Where a Mahomedan donee accepts a gift of property on condition that he would pay certain sums out of the income thereof to certain persons, an obligation in the nature of a trust attaches to the property in the hands of the donees and in the hands of those claiming under him with notice, and such obligation will be enforced by the Courts: 10 WR 25 (PC), *Foll.*; 34 All 478. *Rel. on.*; 22 Bom 489, *Dist.* [P 105 C 1]

A Mahomedan made a gift of her property to three persons, directing that the management of the property should remain in the hands of one of them, and that he should make certain payment out of the income of the property to the other two donees:

Held: that the gift was good and complete under the Mahomedan Law and that the donee to whom the management of the property was entrusted took it on condition that he would make the payments directed by the donor, and that this obligation was enforceable against him and against those claiming under him with notice. [P 105 C 1]

B. N. Bhajekar — for Appellant.

S. R. Bakhale — for Respondent.

Judgment. — By a document dated 5th August 1889, one Umrao Bibi purported to make a gift in favour of three persons, Mirza Vajir Beg, Imtiyaj Begum and Chaggan Bibi, of certain inam lands. She stated that

"the lands have been given to you three as gifts. All my rights of ownership are transfer-

red to you. The vahivat or management of the lands should be made by one of you three, namely Vajir Beg, and after paying Government dues, Rs. 40 should be paid out of the residue of the income annually to Imtiyaj Begum, and the remainder should be divided equally between Mirza Vajir Beg and Chaggan Bibi. Mirza Vajir Beg should have vahivat and give income according to their shares to the two. They have no right of claiming division of the lands from Mirza Beg, but only a right of claiming income every year."

Mirza Beg's interest in the property has now passed to defendant 2, who contends that the deed of gift insofar as it conferred benefits on the two women mentioned therein is void, and that he is absolutely entitled. This suit is brought by Imtiyaj Begum to enforce her rights under the deed of gift. The learned Judge of the lower appellate Court has held, upon the authority of *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum* (1), that the gift is good and complete under the Mahomedan law, and that upon the authority of *Lalijan v. Mahomed Shafi Khan* (2), the deed can be supported in favour of the plaintiff. The last mentioned case is very similar to the present, being a gift in favour of an individual, subject to a condition of payment of one-third of the income to another individual. A suit by the last named beneficiary was brought against the assignee of the other donee. The learned Judges of the Allahabad High Court held that the conclusion of the Trial Judge in favour of the donee of one-third was supported by the decision of the Privy Council in *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum* (1); and that though that was a case between Shias, the rule was considered as applying equally to Shias and Sunnis. The case here is between Sunnis.

It is contended on behalf of the appellant that this Court must follow the ruling in *Amtul Nissa Begam v. Mir Nurudin* (3). That however was a case distinguishable from the present. A Mohamedan there executed a deed of gift in favour of his wife, by which he agreed to give her and her heirs in perpetuity a sum of Rs. 4,000 per annum out of his undivided share in certain jagir villages which he had inherited from his father, and it was held that

1. (1868) 10 WR 25=11 MIA 517 (PC).

2. (1912) 34 All 478=16 IC 105.

3. (1898) 22 Bom 489.

the deed of gift was invalid, as it was a gift in effect of a portion of the future revenues of the villages to the extent of Rs. 4,000 per annum. In the present case Mirza Vajir Beg accepted the lands, the subject of the gift, from Umrao Bibi, and took the benefit of one moiety of the residue of the income on the condition that he would pay a specified annual sum to the present plaintiff, and a moiety of the residue of the income to Chaggan Bibi. That was the condition upon which he took the property, and that was the obligation attaching to the property, in his hands or in the hands of those claiming under him with notice. The decision of the Privy Council in *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum* (1) shows that the Courts should enforce obligations in the nature of trust against persons in possession of property, even though they be Mohamedans, and it is shown clearly by Mr. Faiz Tyabji in his comments upon that decision in para. 408 of his book on Mohamedan Law that the conclusion of the Privy Council was entirely in accord with the views of the Prophet. The passage from the Koran cited by Mr. Tyabji is as follows:

"It is of no avail that ye turn your faces (in prayer) towards the east and the west, but righteousness is in . . . those who perform their engagements in which they have engaged . . . these are the true and these are the pious."

For these reasons we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

G.P./R.K. *Decree affirmed.*

A. I. R. 1916 Bombay 105

SCOTT, C. J. AND HEATON, J.

Basangavda Channappagavda — Defendant—Appellant.

v.

Gangava Kummangavda—Plaintiff—Respondent.

Second Appeal No. 919 of 1914, Decided on 7th March 1916, from decision of Asst. Judge, Dharwar, in Appeal No. 128 of 1913.

Vatan Property—Holder of, under Gordon Settlement, is liable to maintain widow of last male holder.

If a property is held under a sanad under the Gordon Settlement, each successive male holder of such property substantially holds an estate of inheritance in tail male unburdened by any duties of service and such holder is liable for maintenance of the widow of the last holder.

[P 105 C 2]

S. Y. Abhyankar—for Appellant.

A. G. Desai—for Respondent.

Judgment.—The plaintiff, who is the mother of the last male holder of property admittedly vatan, having been postponed in the succession to the defendant as the nearest male member of the vatandar family, under S. 2 of Bombay Act 5 of 1886, has brought this suit to recover maintenance on the ground that she as the widow of a deceased male holder is entitled to maintenance from that holder's successors. The learned trial Judge, dismissed the suit on the ground that service and uncurtailed remuneration must go hand in hand unless the service incumbent on the hereditary office has been commuted and that even if the property had been the subject of the Gordon Settlement, it would not affect the incidents of vatan property unless it were shown that such incidents had been expressly altered or cancelled.

The lower appellate Court, being of opinion that the property must, for reasons stated, be taken to have been the subject of the Gordon Settlement, allowed the plaintiff's claim on the ground that he who takes the benefit of an inheritance must bear the burdens annexed to it in his predecessor's hands. If the property is held under a sanad under the Gordon Settlement, each successive male holder is substantially holding an estate of inheritance in tail male unburdened by any duties of service, in which case the objections expressed by the trial Judge, to the encumbrance of an estate assigned as remuneration for public services may be disregarded.

In this view the hearing of the second appeal was adjourned in order that the pleaders might ascertain whether the property is held by the defendant under a Gordon Settlement sanad. We have now been informed by the pleaders that the suits should be decided on this assumption. We therefore hold that the defendant, having taken by inheritance an estate which the public interest does not require to be held free from the encumbrances binding on his predecessors within the limits of the vatandar family, is liable for the plaintiff's maintenance. We affirm the decree of the lower Court and dismiss the appeal with costs.

G.P./R.K. *Decree affirmed.*

A. I. R. 1916 Bombay 106

SCOTT, C. J. AND HEATON, J.

Ramkrishna Yeshvant Kamat—Defendant—Appellant.

v.

President Vengurla Municipality—Plaintiff—Respondent.

Second Appeal No. 750 of 1915, Decided on 5th October 1916

Civil P. C. (1908), S. 102—Suit cognizable by Small Cause Court refers to nature of suit and not to Court to which tries it—Rent suit for Rs. 250 tried in regular Court is cognizable by Small Cause Court.

The words "suit of the nature cognizable in Courts of Small Causes" in S. 102, Civil P. C., refer to the nature of the suit, that is, to a suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if within its pecuniary limits, and not to the Court which tries the case: 23 *Mad* 547, *Rel on*.

[P 106 C 2]

A rent suit for Rs. 250 was filed in a second class Subordinate Judge's Court who was invested with Small Cause jurisdiction only up to Rs. 50. The suit was decreed and the decree was affirmed on appeal. In second appeal:

Held: that the suit was of a nature cognizable by Courts of Small Causes and no second appeal lay.

[P 106 C 2]

A. G. Desai—for Appellant.*P. V. Kane*—for Respondent.

Scott, C. J.—The preliminary objection taken in this case is that no second appeal lies, on the ground that the suit in which it is preferred is of a nature cognizable by Courts of Small Causes within the meaning of S. 102, Civil P. C., the amount or value of the subject-matter not exceeding Rs. 500. On the other hand, it is contended on behalf of the appellant that a second appeal will lie, because the suit was not cognizable by the Judge of the district in which it was instituted since he was invested with the jurisdiction of a Small Cause Court only up to a limit of Rs. 50. In nature the suit is a suit for rent, and the notification contemplated by Cl. 8, Sch. 2, Provincial Small Cause Courts Act (9 of 1887), has been issued in the Bombay Government Gazette of 1911, whereby the Governor-in-Council was pleased:

"to invest Subordinate Judges of all districts in the Bombay Presidency proper with authority to try on the Small Cause side of their Courts all suits for the recovery of rent arising within the local limits of the ordinary jurisdiction of their Courts and falling within the pecuniary limits up to which suits are cognizable by them, as Judges of Courts of Small Causes."

It has been held by various Courts in India that the words "suit of the nature cognizable in Courts of Small Causes," which was the wording of S. 586 of the Code of 1882, referred to the nature of the suit, that is, to a suit relating to a subject matter over which a Court of Small Causes would have jurisdiction if within its pecuniary limits, and not to the Court which tries the case. There is no substantial difference between the words of S. 586 of the Code of 1882 and S. 102 of the Code of 1908. The particular point which arises for decision in this case was referred to a Full Bench of the Madras High Court, the judgments on which reference will be found reported in *Soundaram Ayyar v. Sennia Naickan* (1). There a rent suit had been instituted before the district Munsif of Madura. The District Munsif's jurisdiction was limited to suits not exceeding Rs. 200 in value, and Shephard, J., one of the Judges whose opinion prevailed, states as follows:

"To my mind, it is, in the legal sense of the term, absurd to say that a suit for Rs. 400 claimed as rent might, but for the fact that the District Munsif's jurisdiction under the Act was limited to suits not exceeding Rs. 200 in value, be tried as a Small Cause, and at the same time to deny that such suit is of the nature of suits cognizable by Courts of Small Causes."

As has been pointed out by my learned brother in argument, the pecuniary limit of the Small Cause Court Judge's jurisdiction in this case is Rs. 50 for all suits cognizable by a Court of Small Causes, but that would be no reason for permitting a second appeal in every suit not excluded by the terms of the Sch. 2, Provincial Small Cause Courts Act, which was tried by him, where the amount claimed is Rs. 60, for all the suits would still be of a nature cognizable by Courts of Small Causes. For these reasons, I am of opinion that the preliminary objection must prevail, that no second appeal lies and the appeal must therefore be dismissed with costs.

Heaton, J.—I agree. I think that the intention of the Legislature is given effect to by the decision proposed, though I am not unmindful of the force of some of the arguments used by Subrahmaniam Aiyar, J., in the Madras Full Bench case of *Soundaram Ayyar v. Sennia Naickan* (1).

G.P./R.K.

*Appeal dismissed.*1. (1900) 23 *Mad* 547.

A. I. R. 1916 Bombay 107

SCOTT, C. J. AND HEATON, J.

Arjun Ramji Mhankal—Defendant—Appellant.

v.

Ramabai Raoji Vithoba—Plaintiff—Respondent.

Second Appeal No. 759 of 1914, Decided on 12th April 1916, from decision of Dist. Judge, Ratnagiri, in Appeal No. 270 of 1913.

Limitation Act (1877), S. 7—Cause of action during minority—Minor dying within three years of attaining majority—Minor's personal representative can sue on same cause of action within three years of minor's attaining majority—Limitation Act (1908), S. 6.

Where a minor acquired a cause of action to sue for possession of property and died after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representative can, although 12 years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the lifetime of the deceased: 15 B L R 357; 9 Cal 663; 17 Mad 316 and 26 Bom 730, Ref.

[P 108 C 1]

P. B. Shingne and *S. M. Varde*—for Appellant.

Coyajee, A. G. Desai and *B. V. Desai*—for Respondent.

Judgment.—The question is whether, where a minor acquired a cause of action to sue for possession of property and died after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representative can, although 12 years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the lifetime of the deceased. In our opinion the personal representative can maintain such a suit. In such a suit the deceased must be included in the term "plaintiff" for the purpose of Art. 142, for according to S. 3, Lim. Act, "plaintiff" includes any person from or through whom the plaintiff derives his right to sue. The title of quondam minor had not been extinguished by 12 years of dispossession, because on attaining majority he was entitled to a further period of three years within which to sue. To use the words of S. 28:

"the period limited for instituting a suit for possession of the property had not determined."

It is otherwise where a minor with

the cause of action more than 12 years in existence dies pending disability. In such a case no extended term has commenced for him: therefore, the cause of action which would survive up to 12 years from its origin would be extinguished on expiry of that period, notwithstanding that the minor had not been able to judge whether or not to sue: for this reason Cl. 3, S. 7, provided a fresh term for the representative of a person with a cause of action lying under disability. The express provision for such a case in Cl. 3, S. 7, does not, therefore, impliedly exclude the right of the personal representative to stand in the shoes of the deceased for the purpose of subsisting causes of action, which is expressly recognized to belong to executors and administrators by S 89, Probate and Administration Act of 1881. In *Mahomed Arsad Chowdhry v. Yakoob Ally* (1), Markby, J., observes that:

"the minor or his representative in interest after his death has a special period allotted to him for bringing the suit. There are no words whatsoever in S. 7 which would give to any other person in whatever way he might happen to be connected with the minor, any other period for bringing the suit than that specified for ordinary persons."

The question was whether the special period was not confined to the minor and his representatives after death to the exclusion of representatives after transfer, if the term 'representatives' could be appropriately used for transferees. A Full Bench of the Calcutta High Court came to a similar conclusion as regards transferees in *Rudra Kant v. Nobo Kishore* (2), though there are dicta of the Chief Justice and Mitter, J., which would confine the rights of representatives after death to the special case provided for by Cl. 3, S. 7. Wilson, J., who was a member of the Full Bench and of the referring Bench, gave reasons for doubting the correctness of the decisions in both the above Calcutta cases. Their correctness has been doubted also by the Madras High Court in *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai* (3), where it is remarked that:

"those decisions involve the apparent anomaly that a minor cannot transfer his title to property though at the date of the transfer it is a subsisting interest so far as he is concerned."

1. (1875) 15 B L R 357.

2. (1883) 9 Cal 663.

3. (1894) 17 Mad 316.

In this connexion also we may refer to S. 6, T. P. Act, which provides that property of any kind may be transferred subject to certain special exceptions. In *Mahadev v. Babi* (4) a Bench of this Court has indicated a preference for the reasoning of Wilson, J., in his judgments in *Rudra Kant's* case (2) and has expressed the opinion that *Mahomed Arsad Chowdhry v. Yakoob Ally* (1) decided that S. 7 limits to the minor and to his representatives after his death the privilege of computing the period, subject to certain conditions, from the date when the disability ceases or from the death of the minor before he can attain majority. In this view we concur. We are not here concerned with the question decided in *Rudra Kant's* case (2) with reference to representatives by transfer. Shridhar, as whose heiress the plaintiff claims, died on 5th August 1910 having attained majority on 21st December 1909—this suit was filed on 22nd May 1912 and is therefore in time. We affirm the decree and dismiss the appeal with costs of respondent 1 payable by the appellant.

G.P./R.K.

Decree affirmed.

4. (1902) 26 Bom 730.

A. I. R. 1916 Bombay 108

SCOTT, C. J. AND HEATON, J.

Chitta Bhula—Defendant—Appellant.

v.

Bai Jamni—Plaintiff—Respondent.

Second Appeal No. 41 of 1915, Decided on 15th February 1916.

Transfer of Property Act (1882), S. 76—Redemption of mortgage—Tagavi claims not paid — Mortgaged property sold — Benami purchaser not bona fide—Equities can be enforced—Mortgagee is liable—Trusts Act (1882), S. 90—Bombay Land Revenue Code (1879), Ss. 56 and 153.

Defendant 1 was a san-mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1901 the plaintiff's mother for the benefit of persons interested in the property took an advance by way of tagavi and gave a charge upon one of the survey numbers, viz., 311, as collateral security for payment of the loan. In 1903 the plaintiff's mother on behalf of herself and her minor daughter, the plaintiff, executed a mortgage-deed with possession in favour of the mortgagee and put him in possession of all the property previously charged under the san-mortgage including the Survey No. 311. The Survey No. 311 was sold in 1906 to satisfy the tagavi advance and was purchased by defendant 2 benami for defendant 1. Subsequently it was purchased by defendant 3, having a notice of everything that had occurred in connexion with the property. The plaintiff sued to redeem the property in 1912, being entitled to the benefit of the Dek-

khan Agriculturists' Relief Act:

Held: (1) that the tagavi advance granted to the mortgagor by the Government was of a "public nature" within the meaning of S. 76, T. P. Act, and that inasmuch as the sale took place owing to the default of the mortgagee, S. 90, Trusts Act, applied and that defendant 1 could not obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee: (2) that S. 56, Land Revenue Code, did not apply inasmuch as there was no forfeiture under S. 153 of that Code: (3) that defendant 3 could not resist the suit, inasmuch as he was bound by the equities enforceable against the vendor by reason of his not being a bona fide purchaser without notice.

[P 108 C 2; P 109 C 2]

T. R. Desai—for Appellant.*B. F. Dastur*—for Respondent.

Judgment.—From the year 1894 to 1903 defendant 1 was a san-mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1900 the mortgagor died, and in the following year his widow Kohili for the benefit of those interested in the property took an advance by the way of tagavi from the mamlatdar, and gave a charge upon one of the survey numbers, namely 311, as collateral security for payment of the loan. In June 1903 acting on behalf of herself and the plaintiff, her minor daughter, she executed a mortgage-deed with possession in favour of defendant 1, and put him in possession of all the property previously charged under the san-mortgage including the Survey No. 311. The plaintiff has brought this suit in 1912 to redeem, she being entitled to the benefit of the Dekkhan Agriculturists' Relief Act.

The only question in the appeal is with reference to Survey No. 311. That survey number was sold in or about 1906 to satisfy the claim of Government in respect of the tagavi advance, and it was purchased ostensibly by defendant 2 who was the gumasta of defendant 1, mortgagee. From him it was subsequently purchased by defendant 3, who is the uncle of the plaintiff and who had for many years been cultivating the land as tenant under the mortgagee, and prior to the mortgage under the mortgagor. Defendant 3 claims to be entitled to hold Survey No. 311 free from any liability, to be redeemed by the mortgagor. Upon the findings of the lower Court he must be held to have had notice of everything that occurred in connexion with the property, and cannot claim the position of a bona fide purchaser without notice of Survey No. 311, if there were in fact any

claims enforceable against the vendor with reference to that plot. It must also be taken on the findings of fact of the lower Courts that defendant 2, purchaser, was a benamidar for defendant 1, mortgagee. It is contended on behalf of the plaintiff that the mortgagee has in effecting the purchase availed himself of his position as mortgagee to gain an advantage in derogation of the rights of the mortgagor. If the sale took place at the instance of the mamlatdar in consequence of some wilful default on the part of the mortgagee, it may fairly be said that in acquiring the property through his benamidar at such sale he has availed himself of his position as mortgagee to gain an advantage spoken of in S. 90, Trusts Act. The question therefore is whether the sale took place owing to his default. S. 76, T. P. Act, lays down that

"when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, and all other charges of a public nature accruing due in respect thereof during such possession."

So far from there being no contract to the contrary in the mortgage-deed, the mortgagee agrees henceforth to pay all sarkari claims in relation to the property. The expression which we have translated "claims" is an expression which is not usual to describe merely Government revenue. The point has been dealt with by the learned District Judge as follows :

"Are tagavi dues a 'charge of a public nature' within the meaning of S. 76 (c)? I think they are. I think that the clause should be liberally construed, as it has for its object the protection of the land from forfeiture of sale for default in payment of Government demand accruing due in respect of the land while it is in the possession of the mortgagee."

It is clear therefore that he had in his mind the question whether this was a Government demand accruing due in respect of the land while it was in the possession of the mortgagee, and he comes to the conclusion that it was. It is argued that as the tagavi advance preceded the mortgage with possession, it would not be a Government demand accruing due in respect of the land while in the possession of the mortgagee. That is a question which might have been settled by evidence if it had been put in issue in the lower Court: the learned Judge feels no doubt as to what the

answer should be, and we are not prepared in second appeal to entertain any doubt as to the correctness of his finding. That being so, S. 90, Trusts Act, would apply, because the sale has taken place owing to the default of the mortgagee. But it was said that once the sale takes place the provisions of S. 56, Land Revenue Code, would apply and if so, there would be no room for the application of S. 90 with reference to the conduct of the mortgagee as such, because ex hypothesi the operation of S. 56, Land Revenue Code, would have extinguished all rights of the mortgagee. We are of opinion that S. 56, Land Revenue Code, does not apply, as it has been held as a fact that there has been no forfeiture such as would be a necessary condition precedent under S. 153, Land Revenue Code, to the application of the provisions of S. 56 for the purpose of recovering dues as arrears of land revenue. The argument also appears to us to be slightly circuitous, because ex hypothesi it is by reason of his default as mortgagee, and by his improperly availing himself of his position as mortgagee, that the sale has taken place. How then can it be said that he is to obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee? This it appears to us, is also the answer to a point which we do not think was appreciated by the learned District Judge, a point of the same nature as that argued under S. 56, Land Revenue Code, and based upon the words of the proviso to S. 7, Land Improvement Loans Act, which by implication would put an end, upon the sale by the Collector for recovery of a Government loan, to the interest of the borrower and of the mortgagee of that interest. For these reasons we think that the decree of the lower appellate Court was right and should be affirmed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 109

BATCHELOR AND SHAH, JJ.

Gururao Shrinivas Heblkar—Plaintiff—Appellant.

v.

Secy. of State and another—Defendants—Respondents,

First Appeal No. 169 of 1913, Decided on 22nd December 1916.

(a) **Grant—Construction—In case of Jagir grant is ordinarily of revenue and not soil—Burden of proof of soil grant is on grantee.**

In the case of a saranjam or jagir the grant is ordinarily of the royal share of the revenue and not of the soil, and the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it: 4 B H C R A C J 1; 6 Bom 598 and 5 Bom L R 983, Ref. [P 112 C 2]

(b) **Grant—Resumption—In case of revenue grant—On resumption actual occupant is not disturbed, but revenue becomes payable.**

In the case of an inam where the grant is merely of the royal share of the revenue and not of the soil, resumption means only the discontinuance of exemption from payment of land revenue and interference with actual occupation is not allowable: 1 B H C R 22 and 2 J Bom 480, Ref. [P 113 C 1]

(c) **Grant—Resumption—In case of grant of soil and revenue resumption and assessment are distinct, but in case grant of revenue resumption implies assessment.**

In the case of jagirs involving grants of the soil as well as of the royal share of the land revenue the words "resumption" and "assessment" mean two different things, but in the case of grants only of the royal share of the land revenue there is no practical difference between resumption and levy of full assessment. [P 115 C 1]

(d) **Grant—Resumption—On resumption assessment is to be determined according to prevailing rates.**

A right to occupy land can exist in villages where no survey settlement is introduced, and in such cases the royal share of the land revenue would have to be determined with reference to the rate obtaining in the village in which the land is situated. [P 116 C 1]

(e) **Grant—Saranjamdar—Resumption—Occupancy lands of—On resumption revenue is payable—Rights remain unaffected—On resumption what is granted can only be resumed—Case-law discussed.**

A saranjamdar may acquire occupancy rights, which remain unaffected by the resumption of the saranjam except as to the assessment thenceforth payable to Government: 6 Bom 598 and 10 Bom 112, Ref. [P 117 C 2]

Government can resume what it has granted as saranjam, viz., the royal share of the land revenue, but the right to the occupation of the land subject to the payment of the full assessment survives the resumption of the saranjam: 11 Bom 235, Foll; 17 Bom 431 (P C), Expl; 34 Bom 329; 29 Bom 415 and 29 Bom 480, Ref; (1881) P J 6, Dist. [P 116 C 1]

(f) **Revenue Jurisdiction Act (10 of 1876), S. 4—On resumption of saranjam grant of revenue—Suit for possession to saranjam lands is not barred.**

The right to the possession of land in the case of a saranjam grant of the royal share of the land revenue does not form part of the saranjam and is independent of it. Therefore, a suit to recover possession of saranjam lands resumed by Government is not barred by S. 4, Revenue Jurisdiction Act: 28 Bom 435, Dist. [P 117 C 2; P 118 C 1]

(g) **Pensions Act (33 of 1871), S. 4—Scope—It does not bar suit for possession of land assessed to royal share of revenue it not**

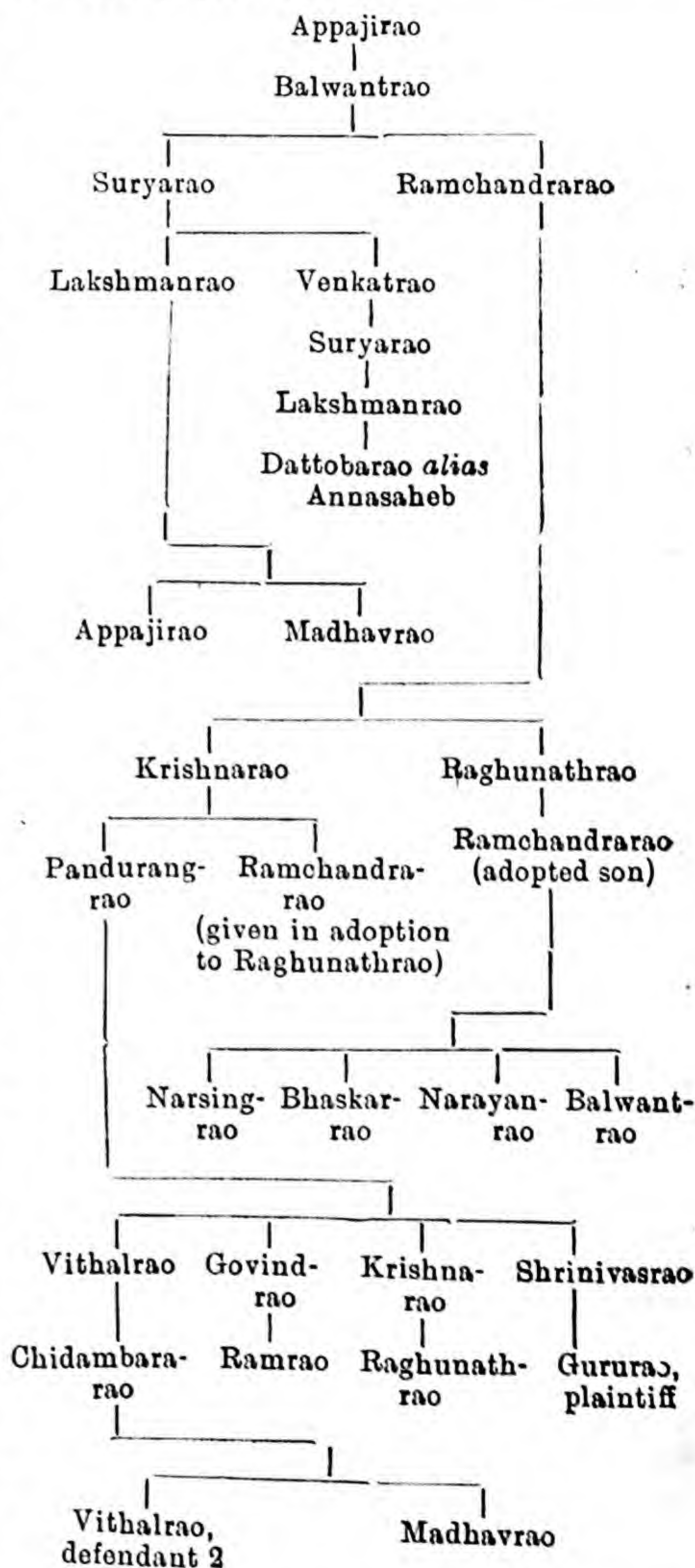
being a pension or grant of money or land revenue.

A claim for the possession of lands subject to the payment of the royal share of the land revenue does not relate to a pension or grant of money or land revenue conferred by the British or any former Government and is not, therefore, barred by S. 4, Pensions Act: 6 Bom 598 and 39 Bom 352, Dist. [P 118 C 2]

K. H. Kelkar—for Appellant.

Coyajee and S. S. Patkar—for Respondents.

Shah, J.—It will be convenient at the outset to set forth the genealogical table of the family of the original grantee of the Hebli Estate:



The original grant of the Kasba Hebli was made to Balwantrao by the Peshwa. At the introduction of the British

Government, the estate was held by Lakshmanrao *bin* Suryarao, and his uncle Ramchandraro. Lakshmanrao died in A. D. 1836 and was succeeded by his son Appajirao. Ramchandraro was succeeded in A. D. 1818 by his sons Krishnarao and Raghunathrao. The latter adopted Ramchandraro, and this adoption was recognized by the British Government in 1839. Krishnarao died in 1842, and was succeeded by his son Pandurangrao. Pandurangrao died in 1899. It is the estate held by Pandurangrao or rather a part of it with which we are concerned in this litigation.

The share of the Hebli estate held by Pandurangrao was resumed by the Bombay Government and re-granted to Narsingrao Ramchandra in 1901. The Secretary of State for India in Council, however ultimately directed in 1904 that Pandurangrao's estate should be resumed and re-granted to Vithalrao, the great-grandson of Pandurangrao. As a result of this grant to Vithalrao the present plaintiff was dispossessed of the lands in suit. The plaintiff Gururao filed the present suit in 1911 in the District Court of Dharwar, to recover possession of the property mentioned in the schedule referred to in the plaint with mesne profits. He based his claim mainly upon two grounds: *firstly*, that the grant to Pandurangrao was a Sarva Inam and not a Saranjam and that, therefore, it was not resumable by Government, but heritable and partible property; and *secondly*, that even assuming the grant to Pandurangrao to be a Saranjam, the Government could resume what they granted, viz., the royal share of the revenue and not the lands, and that the Government could assess the lands and recover the royal share of the revenue but could not dispossess the plaintiff. The property described in the schedule attached to the plaint is claimed as forming one-sixteenth share of the whole estate, i. e., one-fourth of Pandurangrao's one-fourth share in the estate. The suit is filed against the Secretary of State for India in Council, who is defendant 1, and Vithalrao, the new grantee, who is defendant 2.

The defences raised by defendant 1, briefly stated, are that the suit is barred by S. 4, Cl. (a), Revenue Jurisdiction Act (10 of 1876), that the grant is not a Sarva Inam but a Saranjam, that the

plaintiff is not entitled to recover separate possession of the property, as the Saranjam is impartible except to such extent as may be recognized by the Government, and that the Government could take possession of the lands in effecting resumption. Defendant 2 made no separate defence but adopted the contention of defendant 1. On the plaint and the written statement which have been stated in detail in the judgment of the lower Court, several issues were raised. The lower Court in effect found that the grant to Pandurangrao, which was declared by the Government in 1863 to be Saranjam and not Sarva Inam, must be treated as Saranjam and that the Court had no jurisdiction to question the declaration made by the Government. It further found that though the grant was of land revenue the right to hold the lands went with and therefore formed part of the grant, and that the lands were resumable as the grant was. It also found that the lands being held as part of the Saranjam, the suit was barred by the Revenue Jurisdiction Act.

It is not now necessary to notice the findings on other issues. The result was that the plaintiff's suit was dismissed with costs. The plaintiff has appealed from the decree of the District Court, and has practically confined his appeal to the prayer for possession subject to his paying the royal share of the revenue and mesne profits.

It is not contended before us that the original grant was not Saranjam, but Sarva Inam. It is difficult to see how such a contention could be raised now. When the descendants of Balwantrao including Pandurangrao made their claim to the estate as Sarva Inam before the Inam Commissioner in 1858 under Act 11 of 1852, the Inam Commissioner decided that the claimant's title to hold kasba Hebli in Sarva Inam was invalid, but that its enjoyment was not to be interfered with in consequence of his decision (see Ex. 34, para. 31). The Government declared in November 1858 that Hebli should be continued to the family, which held it as hereditary in the fullest sense of the word (Ex. 41) and they further held in 1863 that it was to be regarded as a Saranjam and not as Sarva Inam (Ex. 37). Under the provisions of Act 11 of 1852 it was for the Inam Commissioner and Government to

decide whether the grant was a Saranjam or a Sarva Inam and their decision must be accepted as decisive of the point raised by the plaintiff in the suit, but not pressed in appeal, as to whether Hebli is held by the family as a Sarva Inam or a Saranjam.

It may be mentioned here that Ramrao, grandson of Pandurangrao by his second son Govindrao, had filed suit No. 3 of 1907 against the present defendants, on the ground that the property held by Pandurangrao was Sarva Inam and that the re-grant to Vithalrao was illegal. But that suit was held by the High Court to be barred by S. 4, sub-S. (a), Revenue Jurisdiction Act, and the decision of the Inam Commissioner was held to be final; and it was further held that the title to and continuance of the estate held as Saranjam must be determined under Sch. B, R. 10, Act 11 of 1857, under such rules as Government may find it necessary to issue from time to time. The main point argued in the present case was suggested for the first time in appeal in that case. The High Court however held that it was a question which ought not to be decided in that suit and abstained from expressing any opinion on it; see *Ramrao v. Secy. of State* (1).

The principal point however argued and insisted upon by Mr. Kelkar in support of this appeal is that the Saranjam is merely a grant of the royal share of the land revenue without any relation to the possession of the land, that the grantee may have possession of the lands before the grant or may take possession of any vacant or unoccupied land after the grant, and that the right to the possession and enjoyment of the lands is outside the grant and does not form any part of the grant. It is further argued that the Government can resume only what they have granted, that is, the royal share of the revenue, and that as a result of the resumption the lands which were not liable to assessment may be liable to be assessed. But the possession and revenue of the lands subject to the payment of assessment form part of Pandurangrao's ordinary heritable estate, in respect of which the plaintiff's rights cannot be affected by the resumption of Saranjam. The rule as to resumption in the case

1. (1910) 34 Bom 292=4 I C 832.

of inam lands where the grant is of the royal share of the revenue only has been relied upon as affording a ground for putting the same meaning upon resumption when applied to the case of a Saranjam. By way of reply it is argued on behalf of the respondents that though the grant may be of the royal share of the revenue, the right to hold the land is the result of the grant and forms part of it, and is therefore resumable. It is further argued on behalf of defendant 1 that there could be no occupancy rights in a village held as Saranjam, where there is a succession of life-estates, and that the word resumption in case of a Saranjam cannot have the same meaning as in the case of an inam.

In addition to the answer on the merits, it is contended that the suit is barred by the Revenue Jurisdiction Act and the Pensions Act.

I shall first deal with the merits of the plaintiff's claim, as it seems to me that if he can succeed on the merits the Revenue Jurisdiction Act and the Pensions Act will not afford any answer to his claim. Now it is well established that in the case of Saranjam or Jagir (the terms being convertible) the grant is ordinarily of the royal share of the revenue and not of the soil, and that the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it: see *Krishnarav Ganesh v. Rangrav* (2), *Ramchandra Mantri v. Venkatrao* (3) and *Ramkrishnarao v. Nanarao* (4). Mr. Coyaji for the respondents does not contest this position, and is unable to refer to any document or terms of the grant which would show that the grant was of the soil and not merely of the royal share of the land revenue. In this case the history of the Saranjam, to which I shall refer more particularly later, shows that the grant was made to the family before the British Government acquired the territories, and that during the last century before Pandurangrao's death on all occasions of fresh successions the grant was continued by the British Government on payment of the usual nazrana. On not a single occasion does the grant appear to have been made in terms which would

2. (1866-67) 4 B H C R A C J. 1.

3. (1881-82) 6 Bom. 593.

4. (1903) 5 Bom. L. R. 983.

indicate a grant of the soil or which would indicate that the grant had any relation to the occupation of the lands. The grantees were in prior occupation of the lands and they were continued in possession of the lands without any liability to pay the royal share of the revenue.

It is also a settled rule in this Presidency that in the case of an inam, where the grant is merely of the royal share of the revenue and not of the soil, resumption means only the discontinuance of exemption from payment of land revenue, and that interference with actual occupation is not allowable. The Government Resolution of 1854 is clear on the point: see Ex. 260. This Court has consistently taken the same view as to Inams: see *Vishnu Trimbak v. Tatia* (5) and *Balwant Ramchandra Nattu v. Secy. of State* (6). Before dealing with the question as to how far the same meaning should be put upon the word resumption in the case of a jagir or saranjam when the grant is not of the soil but of the royal share of the land revenue, it will be convenient to deal with the view taken by the lower Court on the evidence and the history of this particular saranjam. The learned District Judge has stated his conclusion in para. 18 of his judgment as follows:

"Obviously what is to be resumed is that which is given and in the case of a saranjam grant of land revenue it is a grant of the land revenue coupled with the right to make the best possible use of unoccupied land, and presumably the whole of this can be resumed."

Further on in para. 20 of the judgment after adverting to the circumstances of the present grant and the incidents of the tenure, he expresses the opinion that the grant was not merely a grant of the royal share of the revenue but included the right to hold the lands and that the lands are therefore resumable with the saranjam. Now first as to the circumstances of this grant. The history of this grant is set forth in the report of the Assistant Inam Commissioner and the decision of the Inam Commissioner Ex. 34, particularly paras. 27 and 28.

The learned District Judge has placed reliance upon the fact that in 1761-62 the Peshva had taken back the jagir with the possession of the lands from

Balwantrao, had made a grant of this saranjam to Yogiram and Bhaskarrao and had given it back to Balwantrao in 1872. We do not know the circumstances under which this temporary change of the grant was made, nor do we know what exactly happened at the time. I consider it wholly unsafe to draw from this circumstance the inference that the original grant by the Peshva was not merely of the land revenue but of the soil. The Inam Commissioner in para. 30 of his decision observes as follows:

"It appears clear therefore that the original grant of A. D. 1761-62 was neither revoked nor altered by the Peshva and that the villages claimed were made over and continued in lieu of the saranjam of Rs. 12,000 per annum sanctioned by the Peshva. The allusion to them in accounts consequently in any other terms than as saranjam is erroneous."

Besides it does not seem to me very material to inquire as to what the Peshva thought of his grant to Balwantrao. He may have treated the right to hold the land as resumable with the saranjam or not. The question is what happened when the British Government acquired the territory and whether they confirmed the saranjam as an ordinary saranjam or saranjam involving a grant of the soil. Then for some years there was disturbance of possession by Tippoo Sultan. But Mr. Coyaji has fairly conceded that such disturbance, which would be the result of invasion and force, would not indicate anything in favour of the view taken by the learned Judge.

It appears from para. 28 of the Inam Commissioner's Report and from other papers in the case that in 1818, 1836, 1839 and 1842 and 1863 fresh successions were recognized on payment of the usual nazrana. There was nothing in this circumstance to show that the grant had any relation to possession of land as distinguished from the royal share of the land revenue. There is nothing to show that the nazrana was calculated on any footing other than that representing the royal share of the land revenue. Besides it does not seem to me at all reasonable to base such an inference upon the fixing of the amount of the nazrana. When the main question is one of recognizing the succession or of making a fresh grant, the question of nazrana is a subordinate question: it is dealt with

5. (1862-65) 1 B H C R 22.

6. (1905) 29 Bom 480.

by the Government, there is apparently nothing like a settlement between the parties of the basis upon which the calculation is to be made, and there is no disturbance of actual possession. Further it is not contended in this case that grants on various occasions have been grants of the soil. Under these circumstances I do not see any reason to think that the papers relating to the nazrana can show any relation of the grants to the occupation of the lands as distinguished from the right to the royal share of the revenue. The evidence of the witness Bhaskarrao (Ex. 232) which is relied upon by the learned Judge does not in my opinion support the theory that the amount of the nazrana was calculated on any basis representing anything more than the amount of the royal share of the land revenue. The point was never put to him specifically on behalf of the respondents, and the general effect of his evidence taken as a whole is against any such theory.

The next circumstance relied upon is the fact that in 1842 on the report of the then Collector of Dharwar, the Government for the better management of the jagir owing to disputes between Pandurangrao and Ramchandarrao, accepted the recommendation of the Collector that the management be handed over to Appajirao, the representative of the senior branch of the family. This, it is suggested, involved a disturbance of the actual possession of Pandurangrao. But admittedly it was for the purposes of management only and not for the assertion or alteration of any right; and it was clearly understood that the arrangement was only sanctioned as a temporary measure in the hope that the parties would soon see that it was for their interest to accommodate their differences: see Exs. 275 and 270. I am unable to hold that this is in any way inconsistent with the occupancy rights of the saranjamdar. Ex. 242 which was put in by the claimants before the Inam Commissioner does not help the respondents in any way. There was no occasion then to differentiate between their rights of occupation and the royal share of the land revenue. The claimants had both the rights, and they were then putting forward a claim to the grant as a *sarva inam*, i. e., an absolute grant.

I have now dealt with all the evi-

dence relied upon by the lower Court and by Mr. Coyaji in the argument before us, in connexion with the nature and circumstances of the particular grant. I am unable to agree with the lower Court on this point. The net result of the examination of the evidence in my opinion clearly is that there is nothing to show that the original grant by the Peshva was of the soil and not merely of the royal share of the land revenue or that it had any relation to the occupation of lands by Balwantrao, that when the British Government first confirmed the grants in favour of the descendants of Balwantrao, the original grantees from the Peshva, they were in occupation of the lands, that the grants were as usual grants of the royal share of the land revenue, and had no relation to the possession of the lands, and that the right to resume the lands at the time of the resumption and re-grant of the saranjam was never put forward by the Government during the last century. Apparently it is put forward on the occasion of the resumption on Pandurangrao's death and is asserted for the first time in 1904, when there was a regrant in favour of Vithalrao; and it is not suggested that the record of the case discloses any prior instance of the assertion of such a right.

It remains now to deal with the view taken by the learned District Judge that "in the case of a saranjam grant of land revenue it is a grant of the land revenue coupled with the right to make the best possible use of the land, and presumably the whole of this can be resumed."

I am unable to agree with this view and in my opinion it does not derive any support either from the statutory provisions relating to saranjams or from the decided cases bearing on the point. On the contrary the combined result of the Acts and decided cases is distinctly in favour of the plaintiff's contention. First as to the statutory provisions, the law relating to saranjams now in force in the territories with which we are concerned is to be found in Act 11 of 1852 and the rules made by the Government in 1898 under R. 10, Sch. B of the Act of 1852. Prior to 1852, there was Regn. 17 of 1827—particularly Cl. 38, made applicable to the territories with which we are concerned by Regns. 29 of 1827 and 7 of 1830. There was Regn. 6 of 1833, Cl. 3, relating to the "general

rules" referred to in Cl. 38, Regn. 17 of 1827. These provisions have been discussed in some of the cases to which I shall have to refer hereafter, and I do not consider it necessary to go over the same ground again. I shall however deal with the provisions with reference to the arguments that have been addressed to us in this case. With reference to Cl. 38, Regn. 17 of 1827 read with appendix B, Mr. Coyaji has argued that the words "resumption" and "assessment" used with reference to jagir cannot mean the same thing. They must have different meanings, which is possible only if resumption has relation to possession of lands and not merely to the discontinuance of exemption from the royal share of the land revenue or assessment. The form of notice of the resumption of a jagir (appendix B) as compared with the form of notice of assessment (appendix D) has been relied upon in support of this argument. In the first place, it seems to me that this argument ignores the obvious fact that the language of Cl. 38 and of the form appendix B is applicable to all jagirs, i. e., to jagirs involving grant of the soil as well as to jagirs involving grants of the royal share of the land revenue, and the clause is not worded with due advertence to the difference between the two classes of jagirs.

Now the language is quite appropriate to jagirs where there is a grant of the soil. But where there is a grant only of the royal share of the land revenue that language is not quite appropriate; and in such a case there may be no practical difference between resumption and levy of full assessment. The use of two different words is sufficiently justified by the fact that in certain jagirs they would mean two distinct things. But there is no rule of construction which compels the inference that the legislature meant that in every case of jagirs "resumption" and "assessment" must in the result mean two different things. That would be practically doing away with the substantial difference between the two classes of jagir or saranjams. Such an extreme view has not been taken in any of the reported cases and, in my opinion, this contention is subject to the infirmity that it establishes too much. Secondly, this clause is no longer in force and we are really concerned with

Act 11 of 1852 and the rules thereunder. S.1, Act 11 of 1852, provides that Chs. 9 and 10, Regn. 7 of 1827, which include the said Cl. 38, do not apply to any of the Districts of the Bombay Presidency which were not brought under the general regulations of Government by Regn. 28 of 1827 of the Bombay Code. Now the territory with which we are concerned was brought under the general regulations by Regns. 20 of 1827 and 7 of 1830 and not by Regn. 28 of 1827.

Under Act 11 of 1852, Sch. A, R. 1 the duty of the Inam Commissioner extended to the investigation of titles of persons holding or claiming against Government the possession or enjoyment of inams or jagirs: and the decisions of the Inam Commissioner under R. 9 of the same schedule would relate to "the continuance, resumption or partial assessment of the land." Here the argument urged on behalf of the respondents with reference to "resumption" and "assessment" in Cl. 38, Regn. 17 of 1827 would apply equally. But I have already pointed out that at least so far as inams are concerned the word resumption has a well defined meaning under Act 11 of 1852 both according to the Government Resolution of 1854 and the decided cases; and there is no valid reason to suppose that it has any different meaning when applied to jagirs.

Under R. 10, Sch. B of the Act of 1852 it is provided that the rules (under the Schedule) shall not be necessarily applicable to jagirs and saranjams, the titles and continuance of which shall be determined as heretofore under such rules as Government may find it necessary to issue from time to time. Now prior to 1898 apparently there were no rules except those mentioned in Col. Etheridge's Narrative of the Bombay Inam Commission (Government Selection No CXXXII, N. S.). Referring to the rules framed under R. 10, Sch. B, Mr. Coyaji relies upon R. 5 which provides that saranjam shall be held as a life estate, and that it shall be formally resumed on the death of the holder and shall be made over to the next holder as a fresh grant. I do not think that this rule touches the present point. The question is not what is the extent of the interest of the saranjamdar in the saranjam but whether the right to hold the lands forms part of the saranjam and whether on the resumption

of the saranjam that particular right to hold the land comes to an end. I have not so far referred to Act 2 of 1863, and I do not think that it has any bearing on the present point as under S. 1, Cl. (2), among other things, lands granted or held as jagirs or saranjams have been excluded from the operation of the Act.

Mr. Coyaji has argued that there is no scope in the case of successive life tenants like saranjamdars to acquire any right to possession of land apart from the saranjam. I am unable to accept this argument. I do not see any reason why it should not be possible for a saranjamdar to create any occupancy right in respect of waste lands in his saranjam, which is a grant only of the royal share of the land revenue, in favour of a third party or of himself. No authority is cited in favour of the view that no occupancy rights are possible in a saranjam estate involving a grant of the royal share of land revenue. It is a position which I cannot accept in the absence of any authority. It was further urged that in the case of the Hebli saranjam there could not be any occupancy rights, as there was no survey settlement. But the right to occupy the land can exist in villages where no survey settlement is introduced, and in such cases the royal share of the land revenue would have to be determined with reference to the rate obtaining in the village in which the land is situated : see Ex. 260, para. 5. As to the decided cases, it seems to me that they are in favour of the view that the right to the possession of the land in the case of the saranjam grant of the royal share of the land revenue does not form part of the saranjam and is independent of it.

In the case of *Ganpatrao Trimbak Patwardhan v. Ganesh Baji Bhat* (7), Sargent, C. J. and Birdwood, J., held in dealing with a saranjam, after referring to the rule as to inams, that no legislative enactment or Government resolution had been cited in support of there being any difference between the tenures as to the effect of resumption by Government. The learned Judges further on refer to the observation in *Ramchandra Mantri v. Venkatrao* (3) and hold that the saranjamdar may acquire occupancy rights, which, as has been shown, remain unaffected by the resumption of the saran-

jam except as to the assessment thenceforth payable to Government. This decision is binding on us, unless it can be treated as overruled by any Privy Council decision. The learned District Judge has treated this decision as not binding upon him on two grounds, neither of which appears to me to be sound. I see no reason to suppose that the observation as to the effect of resumption by Government was made without due advertence to Regn. 17 of 1872, which has been referred to in both the cases : *Vishnu Trimbak v. Tatia* (5) and *Ramchandra Mantri v. Venkatrao* (3). These cases are referred to and relied upon by the learned Judges in *Ganpatrao's* case (7). I do not agree with the learned District Judge that the observation as to the occupancy rights being acquired by the saranjamdars is an obiter dictum. The learned Judges set forth the contention on the point and dealt with it: it was for them to consider whether to decide it or not. As they have decided it, it is a part of their decision. It was open to them to base their decision on an additional and independent ground.

This view has been re-affirmed by Sargent, C. J., in *Hari Sadashiv v. Sheikh Ajmudin* (8). This decision has been treated by the learned District Judge as not binding, on the authority of the decision of the Privy Council in *Sheikh Sultan Sani v. Sheikh Ajmodin* (9). It is necessary to examine this decision with a view to see whether it touches the point decided in *Hari Sadashiv's* case (8). In the case before the Privy Council the principal question was whether the saranjam and inams claimed as part of the inheritance and property which had belonged to the deceased Sheikh Khan Mahomed were or were not political tenures to which the succession could be dealt with by the Government only at its discretion, apart from any jurisdiction of the civil Courts. There was no point in that case that the particular grant being only of the royal share of the land revenue, the right to the possession of the land did not form part of the saranjam and that such right was not therefore resumable and re-grantable by the Government. No such point having been raised, it was not considered and

8. (1887) 11 Bom 235.

9. (1893) 17 Bom 431=20 I A 50 (P O).

7. (1886) 10 Bom 112.

could not be treated as decided in a manner inconsistent with the decision in *Hari Sadashiv's* case (8). Though it is not necessary for the purposes of this case to express any final opinion, it seems from the terms of the grant, firstly, in the agreement of 3rd July 1820 with Sheikh Mira II, and secondly, in the document evidencing the continuation of the saranjam in 1827 to Sheikh Khan Mahomad II on the death of his father Sheikh Mira II, that possession of the lands was given to the grantee on each occasion as part of the grant: at any rate it is not clear that the grant in that case was only of the royal share of the land revenue without any reference to the possession of lands. In a recent case this Court observed with reference to this Privy Council case that a reference to the report of the proceedings in that litigation will show that the lands in suit were held not to be the private heritable and divisible property of the defendant's lessor but to be held on political tenure as part of the saranjam: *Trimtak Ramchandra v. Ghulam Zilani* (10).

Thus it may be that the terms of the particular grant in the Privy Council case were not before the Court in *Hari Sadashiv's* case (8), which related to the same saranjam, and it is possible that the grant was then presumed, as it would now appear not correctly, to be a grant of the royal share of the land revenue. But the rule as to the right of the saranjamdar to acquire occupancy rights when the saranjam grant relates only to the royal share of the land revenue cannot, in my opinion, be treated as being inconsistent with the decision of their Lordships of the Privy Council in *Shekh Sultan Sani's* case (9). There is no other decision of the Privy Council or of this Court which is inconsistent with the view taken by Sargent, C. J., in *Ganpatrao's* case (7) and *Hari Sadashiv's* case (8). On the contrary in the case relating to an inam both cases [*Ramchandra's* case (3) and *Ganpatrao's* case (7)] have been referred to with approval on this point: *Rajya v. Balkrishna* (11). Batty, J., in *Bulwant Ramchandra's* case (6), refers to the view of Sargent, C. J., with approval.

Mr. Coyaji relied upon the case of

Jamna Sani v. Lakshmanrav (12), but in my opinion the case does not help him. It relates to the Hebli estate and the grant by a saranjamdar was claimed by the plaintiff as an absolute grant as being good beyond the lifetime of the grantor, which the saranjamdar could not make. The judgment shows that the only question considered and decided was whether a saranjamdar would make an alienation which would be good beyond his lifetime. It seems to me on an examination of these decisions that the view taken by Sir Charles Sargent, C. J., in *Ganpatrao's* case (7) has been accepted in this Presidency, and must be given effect to.

I am therefore unable to accept the opinion of the learned District Judge that in the case of a Saranjam grant of land revenue it is a grant of the land revenue coupled with the right to make the best possible use of unoccupied land and that presumably the whole of it can be resumed. I hold that the Government can resume what they granted as Saranjam, viz., the royal share of the land revenue, and that the right to the occupation of the land subject, of course, to the payment of the full assessment can and does survive the resumption of the Saranjam. The plaintiff's occupation of the lands in suit cannot be disturbed in consequence of the resumption on Pandurangrao's death and re-grant of the Saranjam to Vithalrao. It remains now to deal with the two objections based on the Revenue Jurisdiction Act and the Pensions Act.

The portion of S. 4, Revenue Jurisdiction Act relevant to this case provides that no civil Court shall exercise jurisdiction as to any claim against Government relating to lands granted or held as Saranjam. It is contended for the respondents that the plaintiff's claim is barred by this provision. It would, no doubt, be barred if the right to the occupation of the lands in suit formed part of the Saranjam. But in the view I take of the case it is clear that the lands are neither granted nor held as Saranjam. As the Saranjam grant is limited to the royal share of the land revenue and the occupation of the lands does not form part of the Saranjam, the suit is not barred. The civil Court can well consider the plaintiff's claim to possession

10. (1910) 34 Bom 329=5 I O 965.

11. (1905) 29 Bom 415.

12. (1881) P J 6.

subject, of course, to his paying the assessment or the royal share of the land revenue according to the prevailing rates in the villages. I have already stated that the plaintiff's claim, so far as it seeks to recover the Saranjam as a Sarva Inam, is clearly barred by this provision. But his claim for possession stands on a different footing. Mr. Coyaji has relied upon the case of *Apiaji v. Secy. of State* (13) in support of his argument on this point. This case was decided under para. 1, Cl (a), S. 4, and the judgment shows that the decision is based upon the inference to be drawn from the evidence in the case that the grant had relation to the occupation of lands, and was not confined merely to an exemption from assessment. The plaintiff's vendor in that case was put in actual possession of the land as a reward for his service. I do not think that the decision affords any basis for holding the present plaintiff's claim barred under the provision of S. 4 to which I have already referred.

It was suggested by Mr. Kelkar that the provisions of the Revenue Jurisdiction Act were bad as offending against the provisions of the Government of India Act of 1858 (21 & 22 Vic. c. 106). He relied upon the case of *Secy. of State v. Moment* (14). The question raised in the general form does not arise in this case. Mr. Coyaji has however clearly pointed out that so far as the claims against Government relating to Saranjams are concerned, the civil Court's jurisdiction was barred long prior to 1858. It will be enough to refer to the regulations applicable to the territories with which we are concerned. Regulation 29 of 1827, S. 6, provides among other things that no claims against Government on account of jagirs shall be cognizable by the civil Courts; and this provision was extended to the District of Dharwar by Regulation 7 of 1830, S. 2. By Act 10 of 1876, these provisions were repealed and S. 4 (a) so far as it relates to Saranjams or Jagirs was enacted. There is a slight change in the phraseology. But I think the expression "claim against Government relating to lands granted or held as Saranjam" in Act 10 of 1876 bears substantially the same meaning as the expression "claims against

13. (1904) 23 Bom 435.

14. (1913) 40 Cal 391=7 L B R 10=10 I A 48=18 I C 22 (P C).

Government on account of Jagir" in the regulations.

The objection based on S. 4, Pensions Act, is clearly untenable. This point was not taken in the written statement, and the lower Court did not allow it to be raised at a late stage. We have, however, heard Mr. Coyaji on this point; and it is enough to say that the claim for possession of lands is not within the meaning of S. 4, Pensions Act.

Under S. 4, Act 23 of 1871, no suit relating to any pension or grant of money or land revenue conferred by the British or any former Government can be entertained by the civil Courts. The claim for the possession of lands subject to the payment of the royal share of the land revenue does not relate to pension or grant of money or land revenue conferred by the British or any former Government. This point has been fully dealt with by Batty, J., in *Balwant Ramchandra's* case (6) and the judgment in that case contains all the reasons for the conclusion that such a claim is not barred by S. 4, Pensions Act. Mr. Coyaji has relied upon *Ramchandra Mantri v. Venkatrao* (3) and *Dattajirao v. Nilkantarao* (15) in support of his argument. *Ramchandra's* case (3) has been fully discussed by Batty, J., in the judgment to which I have just referred, and I desire to express my agreement with the grounds upon which the case is distinguished and not accepted as an authority for the view that a claim for possession of lands falls within the scope of S. 4, Pensions Act. *Dattajirao's* case (15) was decided on its special facts and does not support the respondents' contention. No other objection to the plaintiff's claim for possession of the property in suit has been urged on behalf of the respondents.

There has been no argument before us on the points contained in issues 4, 5, 6, 7 and 8 in the lower Court, and they have not been pressed in appeal. Mr. Kelkar suggested that the grant of the saranjam to Vithalrao in the life-time of his father Chidambarao was not valid. But that is a matter which it is not open to the civil Courts to consider: *Shekh Sultan Sani v. Shekh Ajmodin* (9); and it is clear that in any event Chidambarao and not the plaintiff could complain of it. On these grounds I am of the

15. (1915) 33 Bom 352=28 I C 485.

opinion that the plaintiff's claim for possession of the property in suit should be allowed subject, of course, to the condition that he will be liable to pay the full assessment or royal share of the land revenue according to the prevailing rates in the village to the defendants or rather to defendant 2. There is no reason why the plaintiff should not be allowed mesne profits for three years prior to the date of the suit and future mesne profits. Of course in calculating the mesne profits due allowance must be made in favour of the defendants for the royal share of the land revenue. As to costs, it is true that the plaintiff put forward an untenable claim to the saranjam on the footing that it was a sarva inam. But the ground upon which he succeeds here was substantially the basis of his claim in the lower Court; and as he has succeeded in his main contention, I think he is entitled to his costs in both the Courts. I would, therefore, reverse the decree of the lower Court, and allow the plaintiff's claim for possession subject to his liability to pay the royal share of the land revenue. I would further allow him mesne profits for three years prior to the date of the suit, and from the date of the suit, to the date of the delivery of possession or the expiration of three years from this date, whichever event first occurs, the mesne profits to be determined by the lower Court. The rest of the plaintiff's claim is rejected.

The plaintiff must have his costs throughout. I desire to acknowledge the assistance, which we have received, from the very lucid and able arguments addressed to us in this case.

Batchelor, J.—I entirely agree both with the conclusion and with the reasons for it.

G.P./R.K.

Appeal allowed.

A. I. R. 1916 Bombay 119

SCOTT, C. J. AND HEATON, J.

Abdulalli Badruddin and others—Defendants—Appellants.

v.

Ranchodlal Trikmalal—Plaintiff—Respondent.

First Appeal No. 277 of 1914, Decided on 27th September 1916, from decision of First Class Sub-Judge, Ahmedabad, in Suit No. 538 of 1911.

(a) **Decree—Construction — Partnership—Decree for dissolution fixing date does not relate back for institution of suit.**

Where a suit is brought for the dissolution by Court of a partnership at will, and the Court in its decree fixes a date from which the partnership is to be dissolved, the dissolution commences from that date and does not relate back to the date of the institution of the suit. [P 120 C 2]

(b) **Contract Act (9 of 1872) — Partner has authority to make payment from partnership assets or pass acknowledgments to extend limitation.**

A partner has authority on behalf of himself and other partners to apply the assets in making payments on account of outstanding debts which would have the effect of preventing them from being barred by limitation, and upon the same principle he would have authority to pass acknowledgments which would have the effect of staying off the claims of creditors and on the other hand would save the claims from being barred by limitation: *Read v. Price*, (1909) 2 KB 24, *Ref.* [P 121 C 1]

(c) **Partnership — Suit — Vahivatdar appointed pending suit—He has authority to acknowledge debts due from the partnership to avoid litigation.**

A vahivatdar appointed by Court to do vahivat on behalf of all the parties has authority to do all such acts as would ordinarily be performed or were capable of being performed by any member of the partnership during the currency of the business. Therefore such a vahivatdar has authority to give an acknowledgment of a just debt actually due by the partnership in order to avoid the inconvenience of a suit by the creditor and to save the claim from being barred by limitation: *British Power Traction and Lighting Co. Ltd., In re*, (1907), 1 Ch. 528, *Ref.* [P 121 C 1]

G. S. Rao—for Appellants.

T. R. Desai—for Respondent.

Scott C. J.—The plaintiff sued to recover Rs. 11,817-14-6 with further interest at 6 per cent from date of suit until realization, and costs from the estate of the defendants, being the parties interested in the firm of Farjulla Nurbhai, a dissolution of which had been decreed by the Court at Godhra in a partnership suit in the year 1909. The claim was based upon an original liability of the firm of Farjulla Nurbhai to the plaintiff's father Tricumlal Damodardas for Rs. 9,826, which is found credited in the firm's book to Tricumlal Damodardas under date Shravan Vad 3rd, 1950, and debited in the firm's accounts of Farjulla Nurbhai. The details of the cash entry show that it was paid on account of the ras or joint account of four persons, Tricumlal Damodar and Jalalbhai Karmulabhai and Sulemanji Luckmanji and Badruddin Sarafali. That was a joint account in which Tricumlal Damodar and Jalalbhai Karmulabhai were entitled to

the $\frac{1}{4}$ th share each, and Sulemanji Luckmanji and Badruddin Sarafali, which was the name under which the partners of Farjulla Nurbhai went for the purpose of this particular joint transaction, were interested in the $\frac{1}{4}$ th share each.

The joint account was in respect of a sum of Rs. 33,000 odd advanced to a certain Thakor, Rs 24,000 of which was payable to his creditor one Jethalal, in respect of which Jethalal was satisfied by the persons interested in the joint account. Rs 9,826 represents apparently the sum advanced by Tricumal Damodar to the firm of Farjulla Nurbhai to enable them to satisfy their liability as participants in this joint transaction. It does not appear to us upon the entries which have been referred to that the contention advanced for the appellants should be accepted, namely, that Rupees 9,826 was advanced not only to the firm of Farjulla Nurbhai, but to them jointly with Tricumlal Damodar, the person to whom the money is credited, and his other co-lenders in the transaction with the Thakor. We read the accounts as showing that the liability of Rs. 9,826 rested upon the firm of Farjulla Nurbhai, and that Tricumlal Damodar remained the creditor for the whole amount. The firm of Farjualla Nurbhai never paid the sum due to Tricumlal, but as is abundantly proved to have been the custom in their firm, they executed acknowledgments from time to time to save limitation, such acknowledgments being signed by one or other of the partners. The practice was not confined to transactions with Tricumlal Damodar, for the evidence of witness 77 shows that it was followed with regard to various other creditors, and that the bakees were signed by different members of the partnership.

Carrying on the history of this transaction of Rs. 9,826 we find a bakee, EX. 119, entered in the interest book of the plaintiff's firm for Rs. 9,179-13-9 found to be due on taking accounts signed in the name of the firm Farjulla Nurbhai by the hand of Sulemanji Lukmanji with a promise to pay the sum on demand. That is in 1952. There is another similar bakee in 1955, the third in 1958 and the fourth in 1961. That bakee of 1961 was the bakee which was outstanding at the time of the so-called promissory note sued upon by the plaintiffs in this suit.

The promissory note was executed in 1908, after the institution of a suit for the dissolution of the partnership of Farjulla Nurbhai. It is in similar terms to the bakee which was at that time outstanding, being an acknowledgment of indebtedness upon taking accounts with a promise to pay on demand. The question is whether the person making that so-called promissory note at that time had authority to bind the partners who are defendants in this suit, or their representatives. A charge of fraud was put forward in the written statements that Haideralli, the person making the promissory note, had colluded with the plaintiffs to pass it and got a balance struck by the plaintiffs for the amount that was stolen from the pitha-khata. We do not find however that any issue was raised upon this allegation, and no charge of fraud was specifically made or gone into in the lower Court, although there was a quantity of evidence recorded, which might possibly have some bearing on the question of fraud, or no fraud, if that were the question before the Court. We do not think that having regard to the issue in the case, we should allow the question of fraud to be gone into at this stage.

The question therefore resolves itself into this: Had Haideralli authority, at the time he made the promissory note or bakee, to make it, so as to bind the other persons interested in the firm? The contention on behalf of the appellants is that he had no authority, and is based upon the fact that the partnership was a partnership at will, that a suit for dissolution was filed in March 1908 and that by the filing of the suit the plaintiffs therein ipso facto dissolved the partnership. The suit however was a suit for dissolution by the Court, and the Court in its decree declared that the partnership should be dissolved as from a certain date in 1909 subsequent to the passing of the promissory note sued upon. The plaintiff and all the parties to that suit are bound by that decree, and the dissolution must be taken to have been not before the year 1909. The partnership therefore was not dissolved at the time of the promissory note.

Then it is said that at all events the authority of the partners to act as partners had ceased prior to the making of the promissory note, because the learned

Judge at Godhra had passed an interim order making Haideralli and another partner Tyaballi vahivatdars of the firm for all the parties, to sell the goods, and in the first place to pay the expenses incurred during their management, and to utilize the surplus in paying off the four admitted creditors of the firm, as to whom it was agreed by all the parties that they were creditors of the firm, who should be paid off. The learned Judge stated in his order that the two vahivatdars were to "do vahivat on behalf of all the parties, and not as representatives of separate interests." They were "to do the vahivat of the business of the firm in the way specified above." That was merely an interim order, but it was subsequently extended on 11th July 1908, that is to say, three months after it was made, so that the arrangement should continue until the final decision of the Court or further order. No further order was made until two months later, when a Receiver was appointed. What then is the meaning of the order which appoints the two vahivatdars to do vahivat on behalf of all parties, and not as representatives of separate interests, such vahivat being the vahivat of the business of the firm? It appears to me that that order implies that the two vahivatdars who are members of the partnership shall carry on the partnership as the only authorized agents on behalf of the parties to the suit, that is to say, no act was to be done by any other partners than these two. Each of the two vahivatdars would have authority to do all such acts as would ordinarily be performed or capable of being performed by any member of the partnership during the currency of the business.

Now even if there were no special evidence as to the manner of dealing with outstanding debts in this partnership, it may be taken as the law that a partner has authority on behalf of himself and other partners to apply the assets in making payments on account of outstanding debts which would have the effect of preventing them from being barred by limitation, and upon the same principle he would have authority to pass acknowledgments which would have the effect of staving off the claims of creditors, and on the other hand would save the claims from being barred by

limitation. That these two classes of acts rest on the same principle appears from the decision of Farwell, L. J., in *Read v. Price* (1). But in addition to the ordinary authority implied among partners, we have the special facts of this case, already alluded to, which established beyond controversy that it was the custom of individual partners to pass acknowledgments to creditors in order to carry on the liabilities which the firm was not prepared at the time to satisfy, and with regard to the particular creditor Tricumlal Damodar, that practice was continued over a long series of years. It has been contended however by Mr. Rao on behalf of the appellants that although that may be the ordinary rule among partners, still even though there is no dissolution at the time the promissory note is made, the order of the Court appointing two partners vahivatdars places them in a different position, and prevents them from acting as agents of their co-partners, but makes them merely the servants of the Court whose hands are tied and who are not at liberty to take any steps without reference to or permission from the Court. It appears to me that that argument is inconsistent with the terms of the order, which, as I have already pointed out, says that the two vahivatdars are to do vahivat on behalf of all the parties. It can hardly be under these circumstances contended that they are not agents of the partners for the purpose of carrying on the partnership business. Even upon the English authorities I should be prepared to hold that the act done by Haideralli in this case was an act which he would be justified in performing without reference to the Court which appointed him vahivatdar, because it was one of the ordinary acts of the firm, which was reasonably necessary for carrying on the business of the firm without being liable to the inconvenience of a suit, and possibly an attachment at the instance of the plaintiff. It was not a case in which any fresh liability was incurred by the vahivatdar. He was merely acknowledging an existing one, and I do not think that a Court would ever be disposed to hold that the manager was not entitled to acknowledge the just debts of the firm, if by so doing he would stave off inconvenient litigation in Court. In this con-

1. (1909) 2 K B 724.

nexion I may refer to *In re British Power Traction and Lighting Company Limited* (2) as illustrating the attitude which the Court will take up with regard to the acts of managers. For these reasons I think the decision of the lower Court is right and that the appeal should be dismissed with costs.

Heaton, J.—We are dealing here purely with the point of limitation, when once we have arrived at an understanding that the money sued for is undoubtedly due. That it is so due there can be no doubt, because although an allegation of fraudulent or collusive dealing was made, no issue on that point was raised and it is too late now for the appellants to make use of the evidence on the record for the purpose of convincing us that there was fraud or collusion in the matter of the promissory note or acknowledgment with which we are concerned. The evidence, whatever it amounts to, was not adduced for that purpose. There has not been a trial on that matter. I take it therefore that this money was undoubtedly due and must be paid, unless the claim is barred by the law of limitation. It is not barred if defendant 9 Haideralli had authority to sign this document, whether you call it a promissory note or an acknowledgment. Whether he had such authority depends in this particular case on the terms of the order made by the Judge at Godhra in the partnership suit which was filed in 1908. We have read this order repeatedly, and had it commented on at considerable length and in considerable detail. I read it as meaning that the partnership business was to be continued as a going concern at least for a time under the management of those who were defendants 1 and 9 in that partnership suit, as if those two persons were the only partners in the partnership. That being so, and having regard to the course of business about which a good deal has been said, and if I may say so has been correctly said, by my Lord the Chief Justice, I have in my own mind no doubt whatever that defendant 9 Haideralli had authority to sign that paper, and that in law, as undoubtedly in justice, that paper saves limitation in this case and makes the debt sued for legally recoverable.

G.P./R.K.

Appeal dismissed.

2. (1901) 1 Ch 523.

A. I. R. 1916 Bombay 122

BATCHELOR AND SHAH, JJ.

Mukundrai Atmaram Desai—Applicant, In re.

Criminal Ref. No. 26 of 1916 Decided on 23rd June 1916, made by Sess-Judge, Broach.

Jurisdiction—Sweeping prohibitory order closing burial place—Provision of law not mentioned—Order of Magistrate is illegal.

A District Magistrate acts without jurisdiction in issuing a sweeping public prohibitory order without referring to any provision of law as authorizing such an order [P 123 C 1, 2]

G. N. Thakore—for Applicant.

Facts.—The District Magistrate of Broach issued orders prohibiting on sanitary grounds the burial of corpses in a place previously used by the public for the purpose. On the petition of the applicant the following order of reference was made by the Sessions Judge of Broach: "As remarked by Heaton, J., in *Bhagubhai Dwarkadas v. Emperor* (1): "the District Magistrate has no power whatever to issue a prohibitory order to the public unless that power is specifically conferred by some provision of the law"

See also the observations in the case of *Queen Empress v. Saminadha Pillai* (2). In the present case, the District Magistrate has not stated anywhere under what provision of law the notice was issued. The learned Public Prosecutor relied upon S. 39, Cl. (1), District Police Act (4 of 1890). That section however merely authorizes the District Magistrate to

"make rules or orders regulating the hours during which and the manner in which any place for the disposal of the dead may be used so as to secure the equal and appropriate application of its advantages and accommodation and to maintain orderly conduct amongst those who resort thereto."

The section nowhere authorizes the District Magistrate to prevent the public, either wholly or partially, from using a place previously set apart for the disposal of the dead. Where a place is used both for cremation and burial, it cannot be said that prohibiting its use for burial is

"regulating the manner in which it shall be used so as to secure the equal and appropriate application of its advantages, etc."

There is also no provision in the Criminal Procedure Code empowering the District Magistrate to issue the prohibitory order in question. The only sections which could conceivably be thought

1. AIR 1914 Bom. 193=27 I C 146.

2. (1896) 19 Mad. 464.

to apply are Ss. 133 and 143. The former section empowers the District Magistrate to make a conditional order requiring the person causing a nuisance in any public place to remove it within a certain time, or appear on a certain date and move to have the order set aside or modified. Assuming burial in Dashaswamedha site to be a nuisance within the meaning of the section, still the section does not contemplate the issue of a prohibitory order to the public generally, but only to a particular individual: cf. S. 144, Cl (3), and the order is, moreover, to be conditional in the first instance and the person to whom it is addressed has to be given an opportunity to be heard before it is made absolute. In the present case, it is obvious that the District Magistrate was not acting under this section, and even if he was, the order would be illegal as the prescribed procedure was not followed. Next, as to S. 144. That section empowers the District Magistrate to

"order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law"

As observed in *Queen Empress v. Saminadha Pillai* (2):

"under the section no Magistrate can prohibit what was lawful before the date of his order, and thereby make such an otherwise legal act, committed after the date of the order, punishable as a nuisance under the Indian Penal Code. For he is by that section empowered to enjoin a person from repeating or continuing only a public nuisance as defined in the Indian Penal Code or any special or local law."

The same case lays down that the disposal of a corpse in a place set apart for the purpose is not a public nuisance within the meaning of the Indian Penal Code, so long as the act is performed in a decent and inoffensive way. I am therefore of opinion that S. 143 cannot also be called in aid here. The result is that, in my opinion, the District Magistrate's order was made without jurisdiction and is consequently invalid. It seems to me that the Government has advisedly reserved to itself the power to close a place used for the disposal of the dead, as being a matter deeply affecting the religious feelings of a community and requiring deliberation by the highest authority."

Judgment.—The District Magistrate in issuing this sweeping public prohibition has omitted to refer to any pro-

vision of law as authorizing such an order. We are therefore, left to guess under what authority he conceived himself to be acting, and upon this reference there is no appearance before us in support of the order. For the reasons given in the careful letter of reference by the Sessions Judge, Mr. Taleyar Khan, we are of opinion that the order in question is wholly without jurisdiction. We therefore set it aside.

G.F./R.K.

Order set aside.

A. I. R. 1916 Bombay 123

BACHELOR AND SHAH, J.

Govind Bhikaji Mahajan—Plaintiff—Appellant.

v.

Bhadu Gopal Lad—Defendant—Respondent.

Second Appeal No. 998 of 1915, Decided on 4th December 1916, from decision of Asst. Judge, Thana, in Appeal No. 241 of 1914.

(a) **Transfer of Property Act (1882), S. 59**—S. 59 requires attesting witness to have seen actual execution—Attestation on acknowledgment is not sufficient—Meaning of term attested stated—Attesting witness who is—Execution what is stated.

For the purposes of S. 59, T. P. Act, an attesting witness must witness the actual execution of the document; mere acknowledgment of his signature by the executant in the presence of the witness is not sufficient: 35 *Mad* 607 (PC), *Foll.* [P 124 C 1]

The word "attest" means that the person attesting shall be present and see what passes and shall, when required, bear witness to the facts: *Brynn v. White*, (1850) 2 *Rob* 315, *Rel. n.*

[P 124 C 2]

It is not essential that an attesting witness must be formally described as such on the face of the document. [P 124 C 2]

In the case of an illiterate executant his mark is his signature and is independent of any writing by which the mark may be explained: *Bikar v. Dening*, (1838) 8 *Al & E* 94 and *The goods of Thomas Douce, Douce, In goods of*, (1862) 31 *LJP* 172, *Ref.* [P 124 C 2]

(b) **Transfer of Property Act (1882), S. 59**—Making a mark is sufficient execution—Endorsement by scribe that executant made his mark in his own hand—Held: his endorsement was not in capacity of scribe but as attesting witness.

A mortgage purporting to be executed by one G B, an illiterate person, was written out by one K C V. The deed ended with the words: "I have duly passed in writing this deed of mortgage of my free will after receiving the moneys in cash. The handwriting of K C V." The deed was attested by two witnesses and under the word signature were the following words: "The mark of a dagger representing the signature of G B made by him with his own hands. The handwriting of K C V." The latter de-

posed that he witnessed the execution of the bond by G B's affixing of his mark

Held : (1) that the execution of the deed was completed when G B made his mark. [P 124 C 2]

(2) that the effect of the scribe signing his own name under the description of the mark was to vouch the execution and was made not as a scribe but as an attesting witness : 33 Com 44, Dist. [P 125 C 1]

R. W. Desai—for Appellant.

P. B. Shingne—for Respondent.

Judgment.—The plaintiff, who is the appellant before us, sued to recover on two mortgage bonds. He was defeated in the lower appellate Court because the learned Assistant Judge was of opinion that the bonds were not validly attested as required by S. 59, T. P. Act. The question is, whether this opinion is correct. It is clear to us that in the circumstances of the case the provisions of S. 59, T. P. Act, are satisfied if the plaintiff can rely upon the scribe as an attesting witness. Now the state of facts in which this question is to be decided is this. Both the instruments stand on the same footing and it will be simpler to refer expressly to one only. The executant, then, of this bond was one Gopal Bapu, a marksman. The scribe was one Keshav Chintaman Vaishampayan. The body of the document ends with these words :

"I have duly passed in writing this deed of mortgage of my free will after receiving the moneys in cash. The handwriting of Keshav Chintaman Vaishampayan."

And there follow on the left the attestations of two witnesses, and on the right under the word signature these words :

"The mark of a dagger representing the signature of Gopal Bapu Lad made by him with his own hands. The handwriting of Keshav Chintaman Vaishampayan."

Keshav Chintaman, the scribe, deposes that he witnessed the execution of the bond by Gopal's affixing of his mark. It is settled law that for the purposes of S. 59, T. P. Act an attesting witness must witness the actual execution of the document, and that mere acknowledgment of his signature by the executant is not sufficient: *Shamu Patter v. Abdul Kadir Rowthan* (1). The learned Assistant Judge in explaining why he considers that the scribe here cannot be regarded as an attesting witness says : "The mere making of the mark is not the signature of the executant. There must be something more, that is, a description that it is the mark of so and so. This is done by the writer. The

description, I think, only completes the signature or execution by the executant. The writer is only the alter ego of the executant or acts as an agent for him in writing his name after the mark, and in giving his name an "Dastur" he merely indicates who wrote the document and the signature."

This view appears to us to be erroneous. In our opinion in the case of an illiterate executant his mark is his signature, and is independent of any writing by which the mark may be explained. That, we think, is borne out by S. 3, Cl. 52, General Clauses Act, which explains that the word "sign" shall, with reference to a person who is unable to write his name, include mark. The same view is also expressed in *Baker v. Denning* (2) and in *The goods of Thomas Douse, Douse, In goods of* (3). In this last-mentioned case a will was executed by a marksman whose real name was Thomas Douse, but by mistake he was described as John Douse and against his mark was written "the mark of John Douse." The Court granted probate, being satisfied that Thomas Douse was the person who made the mark; Sir C. Cresswell observing that the execution was perfect as soon as the mark was affixed, so that the writing of the words "the mark of John Douse" against the mark of Thomas Douse did not affect the question. On these grounds we think that the execution of this instrument was completed when Gopal Bapu made his mark.

We have now to consider the effect of the last writing which the scribe made on the paper as set out above. It is nowhere laid down as essential that an attesting witness must be formally described as such on the face of the document. In *Bryan v. White* (4), which was cited with approval by the Privy Council in *Shamu Patter's* case (1), Dr. Lushington pronounced in favour of the validity of a will where there was no attestation clause of any description, and laid down that :

" 'attest' means the person shall be present and see what passes, and shall, when required, bear witness to the facts."

It seems to us that the scribe here is a person who fairly falls within this description. He was present and saw what passed ; now, when required, he bears witness to the facts. His function as scribe ended when he signed his name

1. (1912) 35 Mad 60. = 39 I A 220 = 16 I C 250 (P C).

2. (1844) 8 Ad & E 94.

3. (1862) 31 L J P 172.

4. (1850) 2 Rob 315.

at the conclusion of the body of the document. It is true that if matters rested there, he clearly could not be regarded as an attesting witness: see *Ranu v. Laxmanrao* (5). But the differentiating circumstances in the present appeal is that, immediately after the execution by the marksman, the scribe signs his own name under the description of the mark. His object in so doing presumably was, and the effect of his so doing, in our opinion, was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness. On these grounds we allow the appeal, set aside the decree of the Assistant Judge and restore the Trial Court's decree with costs throughout subject to the variation that the first instalment will fall due on the 1st day of March 1917 and thereafter the money will be payable by annual instalments of Rs. 75.

G.P./R.K. *Decree set aside.*

5. (1909) 33 Bom 44=1 I C 464.

A. I. R. 1916 Bombay 125 (1)

SCOTT, C. J. AND HEATON, J.

Nivajkhan Nathankhan — Defendant Applicant.

v.

Dadabhai Musse Valli — Plaintiff — Opponent.

Civil Exn. Appln. No. 183 of 1910, Decided on 23rd September 1916, from decree of First Class Sub-Judge, Broach, in S. C. Suit No. 636 of 1915.

Limitation Act (9 of 1908), S. 20 — Mere signature by debtor to endorsement of payment of debt does not suffice—It must be in handwriting of debtor.

A mere signature by a debtor to an entry of payment of a debt recorded by a third party is not sufficient to bring the case within the proviso to S. 20, Lim. Act.

A mere signature is not a statement of a payment, and it is meaningless without something in the writing of the debtor to which it is appended which will record the fact of payment: 35 Cal 813, *Foll.* [P 125 C 2]

T. R. Desai—for Applicant.

A. G. Saihaye—for Opponent.

Judgment. — The plaintiff sued the defendant to recover Rs. 219-14-0 as due upon two rent-notes, dated respectively 27th June 1909 and 10th July 1910, the dates fixed for payment of the rent being 13th March 1910 and 2nd March 1911 respectively. The suit was not brought until the year 1915, but the

plaintiff alleged that part-payments of Rs. 15 had been made by the defendant. The part-payments were recorded by endorsements which the plaintiff admitted were in his handwriting but he contended that the endorsement being signed by the defendant was a sufficient acknowledgment within S. 20, Lim. Act. That section provides that

"a fresh period of limitation shall be computed from the time when the payment was made, provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

Now, in these endorsements, the fact of the payment appears in the handwriting of the plaintiff, the person receiving, and not the person making it, and it has been held by the Calcutta High Court in *Santishwar Mahanta v. Luchikanta Mahanta* (1) that a mere signature to an assertion of payment is not sufficient to bring the case within the proviso to S. 20, Lim. Act. In that conclusion we concur. Otherwise it is difficult to understand what is meant by the stipulation that the fact of payment should appear in a particular handwriting. A mere signature is not a statement of a payment, and it is meaningless without something in writing to which it is appended which will record the fact of payment. If, then, the fact of payment recorded is not in the handwriting of the person making the payment, the provisions of the section are not satisfied. It is not alleged here, much less proved, that the person making the payment could do nothing more than sign his name. So it is unnecessary to consider the cases which have allowed as a good acknowledgment a mere signature or a mark, where it is proved that the person paying was able to do no more in the way of recording the payment. We set aside the decree of the lower Court and dismiss the suit with costs throughout.

G.P./R.K.

Decree set aside.

1. (1903) 35 Cal 813.

A. I. R. 1916 Bombay 125 (2)

MACLEOD, J.

Shavaksha Dinsha Davar—Plaintiff.

v.

Tyab Haji Ayub—Defendant.

Original Civil Jurisdiction Suit No. 631 of 1915, Decided on 17th January 1916.

(a) Civil P. C. (1908), S. 89, Sch. 2—Arbitration between parties to suit without order of Court comes under provisions of Sch. 2.

Under S. 89, Civil P. C. 1908, the provisions of Sch. 2, govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court is not excluded and, therefore, comes under the provisions which deal with arbitration without the intervention of the Court. [P 126 C 2]

(b) Award—Filing of, procedure stated—Arbitration Act (1899).

A party applying to a Court for a decree on an award is bound, if the case does not come within the provisions of the Arbitration Act 1899, to apply under Sch. 2, Civil P. C. There is no other law in force under which such an application can be made. [P 127 C 1]

(c) Civil P. C. (1908), O. 23, R. 3—Application to obtain decree on award cannot be made under R. 3.

Order 23 R. 3, Civil P. C. 1908, only refers to the adjustment of suits wholly or in part by any lawful agreement or compromise and no application can be made to obtain a decree on an award under that order. [P 126 C 1]

Jardine—for Plaintiff.

Strangman—for Defendant.

Judgment.—This is a motion taken out by the plaintiff for an order that the adjustment of the suit arrived at between the plaintiff and the defendant as stated in the plaintiff's affidavit, should be recorded and that a decree in accordance therewith should be passed.

The suit was filed on 11th June 1915, the plaintiff praying that the defendant might be ordered and decreed to pay to the plaintiff the sum of Rs. 5,353-9-6 as the price of goods sold. On 31st August 1915, the parties, without the intervention of the Court, agreed to refer the matters in dispute between them concerning the contract referred to in the plaint to the arbitration of Motilal Dayaram and Ramji Meghji. The arbitrators made their award on 28th October 1915. The award was filed on 10th December. In my opinion, a wrong procedure has been adopted. O. 23, R. 3, Civil P. C., of 1908, under which the application is made only refers to the adjustments of suits wholly or in part by any lawful agreement or compromise. No application can be made to obtain a decree on an award except as provided for in S. 89 of the Code. That is entirely a new section. It runs as follows :

"Save in so far as is otherwise provided by the Arbitration Act 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall

be governed by the provisions contained in Sch. 2."

If it had been intended that a party might apply for a decree on an award under O. 23, R. 3, that rule would have been mentioned in S. 89 along with the provisions of Sch. 2. It is suggested that O. 23, R. 3, comes under the description of "any other law for the time being in force" but there is no reference in O. 23, R. 3, to arbitration proceedings. I am aware of the decision in *Pragdas v. Girdhardas* (1), but since the Civil Procedure Code of 1908 came into force, I do not think that decision can be any longer binding on me. It seems that the opinion formerly held good, as stated by Farran, C. J., in *Ghellabhai v. Nandubai* (2), that there was no section of the Civil Procedure Code of 1882 which specially enabled a Court to take cognizance of a submission to arbitration of a matter in issue in a suit made pending the suit other than a submission through the Court, or of an award made upon such a submission, and that such a submission and award could only be taken cognizance of in the same suit as an adjustment under S. 375, Civil P. C. of 1882, now represented by O. 23, R. 3. However that may be, it seems clear that under S. 89 the provisions of Sch. 2, govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must therefore come under the provisions which deal with arbitration without the intervention of the Court. I do not see myself why the words "without the intervention of the Court" should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties to a suit, and in my opinion, S. 89 is now conclusive on the question.

It seems obvious that if an application for a decree on an award could be made under O. 23, R. 3, as soon as it has been proved to the Court that there has been an agreement to refer and an award the Court would be bound to order the award to be recorded as an agreement or compromise, and would be bound to pass a decree in accordance therewith.

1. (1902) 26 Bom 76.

2. (1897) 21 Bom 355.

excluding all the provisions of Sch. 2, relating to the powers of the Court when an application is made for a decree on an award. Para. 20 and the following paragraphs of Sch. 2, refer to arbitration without the intervention of the Court and under para. 21, where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in para. 14 or para. 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Para. 14 gives the Court power to remit the award under certain circumstances to the arbitrator. Para. 15 gives the Court power on certain grounds to set aside an award. Therefore in my opinion there is no other law at present in force except the Arbitration Act of 1899 and a party applying to the Court for a decree on an award is bound, if the case does not come within that Act, to apply to the Court under Sch. 2.

The defendant now disputes the legality of the award on two grounds: first, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide, secondly, that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence, they published their award without giving him any such opportunity. I think the defendant is entitled to raise those objections and be heard upon them. Therefore the application by consent is now to be treated as an application under para. 21 of Sch. 2 and can be set down for hearing on praecipe in order to decide those questions. Costs to be costs in the application.

G.P./R.K.

*Order accordingly.***A. I. R. 1916 Bombay 127**

SCOTT, C. J. AND HEATON, J.

Ahmad Asmal Muse—Plaintiff—Appellant.

v.

Bai Bibi—Defendant—Respondent.

Second Appeal No. 936 of 1915, Decided on 27th November 1916, from decision of Dist. Judge, Broach, in Appeal No. 63 of 1914.

(a) **Bhagdari Act (5 of 1862)**—Will by Mahomedan in respect of bhagdari lands—Mahomedan law governs it.

A will made by a Mahomedan in respect of his bhagdari lands is governed by the rules of Mahomedan law relating to wills. [P 128 C 1, 2]

(b) **Mahomedan law—Will—Consent—Bequest of certain bhagdari lands in favour of widow and daughter**—Suit by residuary sharer for declaration held Mahomedan law applied—In absence of consent of all heirs will was inoperative—Held also plaintiff being nearest reversioner was entitled to succeed after death of widow.

A deceased Mahomedan purported to dispose by will of certain bhag property in favour of his widow with a remainder to his daughter and her issue if she survived the widow. The plaintiff a residuary of the testator according to the Mahomedan law, sued for a declaration that he was the nearest agnate of the deceased, that the latter's widow and daughter acquired no rights by the will and that he was entitled to the property after the death of the widow:

Held: (1) that the will was governed by the rules of Mahomedan law and being in favour of a part of the heirs and not being consented to by the plaintiff was invalid; 2) that the plaintiff being the nearest reversionary heir was under the custom relating to bhagdari lands, entitled to a declaration of his right to succeed to the land after the death of the widow: *A. I. R. 1916 P C 117, Ref.* [P 128 C 1, 2]

(c) **Bhagdari lands—Will—Per Heaton, J.,—(Obiter)** Will otherwise valid according to personal law is inoperative if contravening **Bhagdari Act, (5 of 1862)**.

Per Heaton, J. —(Obiter) A will relating to bhagdari lands which is otherwise valid according to the personal law of the testator, will be inoperative in so far as it offends against the provisions of the Bhagdari Act. [P 129 C 1]

G. S. Rao—for Appellant.

G. N. Thakur—for Respondent.

Scott, C. J.—A deceased Mahomedan purported to dispose by will of certain bhag property and other property in favour of his widow, with a remainder to his daughter and her issue if she survived the widow. The plaintiff is a residuary of the testator according to Mahomedan law. He sues for a declaration that he is the nearest agnate of the deceased, and defendants 1 and 2, that is the widow and the daughter, acquired no rights by the will, and that he is entitled to the property after the death of the widow. The suit relates only to the bhagdari properties, which in the absence of a will devolve by custom upon the bhagdar's widow, if he dies sonless for her life, and after her death are inherited by his nearest male agnate to the exclusion of the daughter and sister. The plaintiff is therefore interested in

the property both under the Mahomedan law, and under the custom in the absence of a will. He charged that the widow and the daughter were managing the properties in suit and wasting them to harm plaintiff's future rights. The waste alleged is that two portions of the property in suit have been given to a masjid and that the rest of the property has been transferred to the name of the daughter with the intention of her becoming the owner thereof.

The learned Judge in the trial Court held that the acts of waste had not been proved, and that therefore a receiver should not be appointed, but being of opinion that the will was contrary to the Mahomedan law, passed a decree in favour of the plaintiff declaring him the nearest agnate of the deceased and entitled to succeed to his bhag property in suit after the death of the widow, and that the will of the deceased was inoperative so far as the bhag property in suit was concerned, and that defendant 2 did not acquire any right to the property under the said will against the plaintiff. On an appeal being preferred to the District Judge the decree was reversed and the suit was dismissed, the ground being that although according to Mahomedan law a will in favour of one of the heirs or a part of the heirs is invalid unless the other heir or heirs consent, the rule could not be applied so as to bring in a course of devolution according to the bhagdari custom which would be at variance with the Mahomedan law. It is however conceded that a will can be made of bhagdari property notwithstanding the existence of the custom. The existence of the custom does not destroy the testamentary capacity of the owner. If then the owner is a Mahomedan, what is his testamentary capacity? There is no evidence in the case that his testamentary capacity has been converted by custom into something different from the ordinary capacity of a Mahomedan testator. That capacity is limited by the rule of testation above stated. It appears to me therefore that the rule of Mahomedan law is the only law which can be applied and according to it the will is invalid. If so the plaintiff is the presumptive reversioner under the bhagdari custom. It has been held by the Privy Council in *Janaki Ammal v. Narayana-*

sami Aiyar (1), that if there has been waste or there is danger to the estate established, a possible reversionary heir may come in and ask for relief. There are cases of waste alleged and there is a danger of transfer to defendant 2 suggested. Neither of these points have been discussed by the learned District Judge, and as we are of opinion that his judgment upon the preliminary question of the application of the rule of Mahomedan law to the will of the deceased cannot stand, we set aside the decree and remand the case for disposal upon the other questions discussed in the trial Court. Costs costs in the cause.

Heaton, J.—I agree. I think that in this case the correct solution is furnished, as it often is by the simplest method of dealing with the case. We have a Mahomedan making a will. Under the Mahomedan law there are three persons who in case of an intestacy would inherit his property. By his will he bequeathed the whole of it to one of these three persons, with remainder to the second, and he left the third, the plaintiff out of the property altogether. The plaintiff never has consented to this form of will, and therefore under Mahomedan law the will is invalid. Unless we are to deal with the will as a will made by a Mahomedan, and therefore subject to the Mahomedan law relating to wills, I cannot for myself discover how we ought to deal with it. I cannot accept the District Judge's reasoning, although I think that it is very ingenious and also that it is a very earnest effort to find a way out of a difficult position. He thinks that the law relating to bhagdari property eliminates the Mahomedan law of wills altogether in the case of a will concerning bhagdari property, and we have such a will here. But to my thinking the existence of bhagdari property does not affect the Mahomedan law of wills in any way beyond this; that bhagdari property might in certain circumstances be taken out of the operation of a will. That would happen if the will provided for a division of the testator's property which would be contrary to the Bhagdari Act. In that case the property would be taken out of the operation of the will because the Mahomedan law could not be ap-

1. AIR 1916 P C 117=37 I C 161=39 Mad 684 =43 I A 207 (P C).

plied to it. But I do not think and I cannot see how the existence of bhagdari property can affect the Mahomedan law of wills any further than that. In this particular case the will leaves the entire property, including bhagdari property, to one person. It does not in any way offend against the provisions of the Bhagdari Act. So far as they are concerned, the will would be a perfectly valid will. But when we come to consider the rule regulating the testator's power to make a will, then we find that the will is invalid.

G.P./R.K.

*Case remanded.***A. I. R. 1916 Bombay 129**

SCOTT, C. J. AND HEATON, J.

Achratlal Jekisendas—Appellant.

v.

Chimanlal Parbhudas—Respondent.

First Appeal No. 63 of 1916, Decided on 14th April 1916, from decision of Joint Judge, Ahmedabad, in Misc. Appln. No. 41 of 1913.

(a) **Guardians and Wards Act (1890), — Father not having care or custody of son can file regular suit for custody but cannot apply under Act for order on person in whose custody infant is.**

A father who has never had the care or custody of his infant child can file a regular suit for the custody of his son, but cannot successfully call upon a Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over to the father. [P 130 C 1]

The dictum of the Privy Council in *AIR 1914 PC 41=38 Mad 807.*, to the effect that a suit inter partes is not the proper proceeding is not intended to be of such general application as virtually to overrule the decision in, *25 Bom 574.* [P 129 C 2]

(b) **Guardians and Wards Act (1890)—District Court has no inherent power to make order not expressly conferred by Act.**

The jurisdiction of the District Court in the matter of minors is defined by the Guardians and Wards Act and it has no inherent power to make orders with reference to minors which are not expressly conferred upon it by that Act. [P 129 C 2]

G. N. Thakor—for Appellant.

Kanga and M. H. Vakil—for Respondent.

Judgment.—The question in this appeal is whether the father, who has never had the care or custody of his infant child, can successfully call upon the Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over. The learned Joint Judge holds that the father has

two courses only open to him, viz., to file a regular suit for the custody of his boy, or apply to the High Court for an order in the nature of habeas corpus under S. 491, Criminal P. C. In regard to the Criminal Procedure Code, S. 491, the learned Judge is in error, for such an application could only be made in a case falling within the limits of the ordinary civil jurisdiction of the High Court, whereas this is an Ahmedabad case. That a suit can be filed for the custody of the boy may be conceded on the authority of two decisions in this Court, one being *Sharifa v. Mune Khan* (1) and the other being referred to in the report in that case. We are not prepared to hold that the dictum of the Privy Council in *Mrs. Annie Besant v. Narayaniah* (2) to the effect that a suit inter partes is not the proper proceeding was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa v. Munne Khan* (1).

The only question remaining then is whether the learned Judge was right in refusing to make an order on the application under the Guardians and Wards Act. It may be taken on the authority of the Privy Council in *Mrs. Annie Besant v. Narayaniah* (2) that the jurisdiction of the District Court is defined by the Guardians and Wards Act, and that it has no inherent powers to make orders with reference to minors which are not expressly conferred upon it by that Act. The chapter of the Act relating to the appointment and declaration of Guardians is Ch. 2. S. 12 provides for the summoning before the Court of the minor for whom an application has been made for the appointment of a guardian, and for the interim custody of the minor pending the hearing of the application under S. 13. Then S. 17 lays down matters to be considered by the Court in appointing a guardian and Cl. 4 of that section lays down the respective rights of parents claiming guardianship where those parents are European British subjects. In such cases the Court will appoint one or other of them a guardian, and the minor will then be given to such parent as his appointed guardian. But where the parents are

1. (1901) 25 Bom 574.

2. *AIR 1914 PC 41=24 IC 290=38 Mad 807=41 IA 314 (PC).*

not European British subjects, S. 19 lays down that nothing in the chapter shall authorize the Court to appoint or declare a guardian of the person of a minor whose father is living, and is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

Now if a father has had the care and custody of his infant child, he may be within the definition of the Act a "guardian," and the provisions of Ss. 24 and 25 may then apply to him. But that is not the case where he has not had the custody of his infant child. S. 25 cannot apply to this case for the ward has never left or been removed from the custody of his guardian; nor again can the provisions of S. 24 be invoked, which were held on a liberal interpretation by the Allahabad High Court in *Utma Kuar v. Bhagwanta Kuar* (3) to justify the Court in obtaining and delivering over the custody of a minor to a Mahomedan mother who had been appointed guardian by the Court. It appears to us that on the peculiar facts of this case the learned Joint Judge is right and the only remedy of the father is to file a suit. We think that under the circumstances of the case we should make no order as to costs.

G.P./R.K.

Order confirmed.

3. AIR 1915 All 193=29 IC 416=37 All 515.

A. I. R. 1916 Bombay 130

SCOTT, C. J. AND HEATON, J.

Naro Gopal Kulkarni and others—
Defendants—Appellants.

v.

Paragowda Basagowda and others—
Plaintiffs—Respondents.

Letters Patent Appeal No. 43 of 1915, Decided on 28th September 1916, from order of Batchelor, J., in Second Appeal No. 832 of 1915.

(a) **Hindu Law—Alienation—Father—Antecedent but time-barred debt—Alienation is not binding on sons living—Alienee gets father's share on date of alienation—Alienation by joint tenant effects severance.**

The alienation of joint family property by a Hindu father to discharge an antecedent time-barred debt is not binding on his sons who are in existence at the date of the alienation: 33 *Mad* 308, *Ref.* [P 131 C 1]

The alienee, however, is entitled to the father's share in the property and his right is not affected by the birth of sons to the alienor subsequent to the alienation, inasmuch as the alienation by a joint tenant effects a severance of the tenancy as a result of which the alienee, before

division by metes and bounds, becomes a tenant-in-common: 21 *Bom* 797 and 4 *Mad* 408, *not Foll.*; 11 *BHCR* 72 and 12 *B H C R* 1:8, *Foll.*; 23 *Cal* 670 (*PC*); 11 *BHCR* 76; 35 *Mad* 47 and 10 *Cal* 626 *Ref.* [P 131 C 2]

(b) **Hindu Law—Joint family—Alienee from coparcener gets right to partition and not possession—Decree allowing son's share unaffected by father's alienation should order possession of whole subject to alienee's right to get father's share partitioned—Partition can be ordered if prayed for.**

The alienee only acquires a right to partition and not to possession before partition. In a suit, therefore, by the sons for possession of property improperly alienated by their father the decree, which allows the sons' claim, should direct recovery of the whole property, declaring at the same time that the purchaser had acquired the share and interest of the alienor and is entitled to take proceedings to have it ascertained by partition: 10 *Cal* 626 (*IC*), *Ref.*

Where however there is an alternative prayer for partition the Court should at once decree partition. [P 132 C 2]

(c) **Hindu Law—Alienation—Coparcener—Consideration absence of—Other coparceners can set it aside.**

Per *Heaton, J., Obiter.*—A Hindu coparcener can only make a valid alienation of his share or part of his share in an undivided Hindu family property if he does so for valuable consideration. If there is no consideration at all for the sale, the sale is invalid and can be set aside in toto by the other coparceners. [P 132 C 2]

Coyajee and K. H. Kelkar—for Appellants.

Jayakar and A. G. Desai—for Respondents.

Scott, C. J.—This suit was instituted by the plaintiffs as members of a joint Hindu family, of which their father defendant 2 was the head, to set aside a sale of certain family land, being Survey No. 722 measuring 19 acres and 11 gunthas, executed by defendant 2 in favour of defendant 1 on 19th September 1901, and to recover possession thereof from defendant 1 or in the alternative for their two third share therein by partition or at least for joint possession with defendant 1; they alleged that the sale deed was taken from defendant 2 by undue influence and for no consideration. The learned Judge of the trial Court held that the consideration for the deed was an antecedent debt, which though barred by time was acknowledged by the registered sale deed and further advances aggregating Rs. 1,500 which he held established. He held that even the antecedent debt would authorize an alienation by the father binding on the sons and he dismissed the suit with costs. His decree was

reversed on appeal, the learned appellate Judge holding that as regards the Rs. 1,500 representing the further advances they were not proved to have been made and as regards the Rs. 1,500 in respect of the acknowledged time-barred debt, defendant 2 must have been influenced unduly by defendant 1 and could not have given his free consent to its inclusion as part of the consideration. He decreed that the plaintiffs and defendant 2 should be restored to possession of the property in suit. It may be conceded that the learned trial Judge was in error in thinking that a time-barred debt could support an alienation by a father of joint family property even against his sons: see *Subramania Aiyar v. Gopala Aiyar* (1), and as to the Rs. 1,500 representing fresh advances it may for the purpose or argument be assumed that the appellate Court was right in holding them not proved: the question however still remains whether the time-barred debt acknowledged by the registered deed was not good consideration for the alienation of defendant 2's interest in the property.

Upon the findings of the lower appellate Court the plaintiffs are not, or at all events the adult plaintiff is not, bound by the deed and it may to that extent be treated as a nullity: see *Unni v. Kunchi Amma* (2). But it is otherwise with defendant 2, the executing party whose interest is prima facie bound by his deed. Assuming the deed was obtained from him by undue influence it is only voidable at his option. He however has not sought to avoid it. His right to file a suit for such a purpose has long since been barred by limitation. His sons have no right to exercise his option. To hold, as has been held by the lower appellate Court, that he cannot have done willingly what he has explicitly purported to do in his sale deed is to make a case which was not open to him and which he never tried to make for himself. The lower appellate Court has not found that no moneys were expended by defendant 1 for defendant 2 which could be acknowledged. Such a finding would be impossible in view of defendant 2's admission when called as a witness on behalf of the plaintiffs:

"I was plaintiff in Suit No 415 of 1887. Naro Gopal (defendant 1) used to assist me with money in that suit. I passed a document for that am unt."

The learned Judge says that the documents show that defendant 2 was at least reckless in matters of business and incapable of exercising ordinary prudence. That however, is no justification for disregarding the terms of S. 19-A Contract Act, and Art. 91, Lim. Act. Defendant 2 is therefore, bound by his deed and defendant 1 is entitled to defendant 2's interest in the property. We have next to consider what is the interest in the property which passed to the purchaser. Is it the half share to which defendant 2 was entitled at the date of the sale or the one third to which but for the alienation defendant 2 since the birth of his younger son would now be entitled? As remarked by Sir Charles Farran in *Gurlingapa v. Nandapa* (3), the decisions in *Pandurang Anandray v. Bhaskar Shadashiv* (4) and *Mahabalaya v. Timaya* (5) point to the period of alienation as that at which the rights of the alienee are to be determined, but the Court nevertheless in *Gurlingapa v. Nandapa* (3) laid down obiter, following the decision of the Madras High Court in *Rangasami v. Krishnayyan* (6), the proposition that a purchaser of a coparcenary share stands in no better position than his alienor and consequently like the latter is liable to have his share diminished before partition by the birth of other coparceners if he stands by and does not insist on partition.

This conclusion appears to be inconsistent with the proposition that an alienation by a joint tenant effects a severance as a result of which the alienee before division by metes and bounds becomes a tenant in common: see *Jogeswar Narain Deo v. Ram Chandra Dutt* (7), *Udaram Sitaram v. Ranu Panduji* (8). It is also, as pointed out in *Chinnu Pillai v. Kalimuthu Chetti* (9), [in which *Rangasami v. Krishnayyan* (6) was dissented from], inconsistent with the orders passed by the Privy Council in

3. (1897) 21 Bom 797.

4. (1874) 11 B H C R 72.

5. (1875) 12 B H C R 138.

6. (1891) 14 Mad 408.

7. (1896) 23 Cal 670=23 I A 37 (PC).

8. (1874) 11 B H C R 76.

9. (1912) 35 Mad 47=9 I C 596.

1. (1910) 33 Mad 308=7 I C 898.

2. (1891) 4 Mad 26.

Hardi Narain Sahu v. Ruder Perkash Misser (10).

In this state of the authorities we must hold that defendant 1 acquired the half share in the alienated property to which defendant 2 was entitled at the date of the alienation owing to the fact that the minor plaintiff was not then born. The plaintiffs are interested equally in one moiety only of the property in suit. Defendant 2 whose interest is now confined to the other family property, if any, raises no objection to partition being limited to the property in suit. Under the circumstances I do not think defendant 1 as tenant-in-common of one moiety of the suit land can object to partition: *Subramanya Chettyar v. Padmanabha Chettyar* (11) and *Ram Charan v. Ajudhia Prasad* (12).

Heaton, J.—My only difficulty in the case is this. If there was no consideration at all for the sale of the property by defendant 2 to defendant 1 in 1901, the sale is invalid and can be set aside at the instance of the plaintiffs. For a Hindu coparcener can only make a valid alienation of his share or part of his share in an undivided Hindu family property if he does so for valuable consideration. This aspect of the case is one which was presented in this Court, but was not considered by the Court of first appeal. The Judge of that Court dealt with the question of consideration more generally. He asked himself the question whether the consideration stated in the sale deed was proved. He found that it was not and he further found that it was not proved what the consideration actually was. But he did not ask himself the question whether it was shown that there was not any consideration at all. There are indications in his judgment that he was not of opinion that there was no consideration whatever for the sale. He does not repudiate or contradict the finding of the trial Court that there was or at least had been an antecedent debt payable by defendant 2 to defendant 1. Therefore we can find for ourselves that there was valuable consideration. That, I think, is an appropriate way out of the difficulty which confronts me and, moreover,

it is a way which brings about a conclusion consonant with law and justice.

I agree that by the sale, defendant 2 acquired a share of one-half, not of one-third only, in the land sold. But he acquired a right to partition, not a right to possession prior to partition. As their Lordships of the Privy Council stated in the case of *Hardi Narain Sahu v. Ruder Perkash Misser* (10), "according to the judgment of their Lordships in *Deendyal Lal v. Jugdeep Narain Singh* (13), the decree, which ought properly to have been made would have been that the plaintiff should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition."

Still in this case the plaintiffs have sued in the alternative for partition so the theoretical objection to a decree for partition disappears. There must, therefore, be a decree for partition in equal moieties; each party to bear his own costs throughout.

G.P./R.K.

Order accordingly.

13. (1877-78) 3 Cal 198=4 I A 247 (PC).

A. I. R. 1916 Bombay 132

MACLEOD, J.

Narotam Morarji Gokuldas and others
—Plaintiffs.

v.

Indian Specie Bank—Defendant.

Original Civil Suit No. 364 of 1916,
Decided on 17th November 1916.

Company — Liquidation — Contributory—Share holder misrepresented that his shares were sold as directed—He however received dividend warrants which he returned duly signed to be handed over to purchaser—Receipt of dividend warrant was notice of his name remaining as share-holder — He was therefore rightly held liable as contributory—He was not entitled to damages for misrepresentation.

Plaintiff owned a number of shares in a certain Bank and entrusted them to the Managing Director of the Bank for sale. It was part of the Bank's business to sell shares for their customers. A few days afterwards the plaintiff was told by the manager that the shares had been sold and their price was credited to his account. Subsequently warrants for dividend on the shares were sent to the plaintiff, who signed them and returned them to the manager to be handed over to the purchaser of the shares. The Bank went into liquidation and the plaintiff was placed on the list of contributories by the liquidator and he then discovered that the shares had never been sold so that his name still remained on the register of shareholders. His claim to be removed from the list was disal-

10. (1884) 10 Cal 626=11 I A 26.

11. (1896) 19 Mad 267.

12. (1906) 28 All. 50.

lowed and he was compelled to pay a call made by the liquidator. He sued to recover the amount from the Bank on the ground of the neglect and misconduct of the Managing Director:

Held: (1) that the plaintiff had notice that his name remained on the register after he thought the shares had been sold, inasmuch as the dividend warrant was sent to him; [P 134 C 2]

(2) that the direct consequence of the manager's misrepresentation was that the plaintiff remained the owner of the shares in the Bank's register and he was not therefore entitled to recover any damages: *Neilson v. James*, (18 2), 51 L.J.Q.B. 369 and *Waddell v. Bloeky*, (1879) 4 Q.B.D. 678, *Ref.* [P 134 C 2]

Desai and Strangman—for Plaintiffs.

Campbell and Mulla—for Defendant.

Judgment.—Plaintiff 1 was the owner of 161 shares in the Indian Specie Bank, which were held for him in the names of plaintiffs 2, 3 and 4. In April 1913, as he was leaving for Europe he directed plaintiff 2, his Secretary, to sell the shares. He had only receipts for the certificates which had remained with the Bank ever since the shares had been bought in 1910. On 17th May plaintiff 2 took these receipts with blank transfers duly signed to Chunilal, the Managing Director of the Bank, and asked him to sell the shares. It was part of the Bank's business to sell shares for their customers and a register was kept of securities handed to the Bank for sale. Chunilal said the Bank would sell the shares and asked plaintiff 2 to come back in a few days. On 22nd May he went to the Bank and was told the shares had been sold at Rs. 66 and was paid Rs. 6,000 on account, for which he passed a receipt. He was asked to come back in a few days when the account would be settled. He returned on the 29th when he received a further sum of Rs. 4,500 and passed a receipt in the same form as before. The gross sale-proceeds were Rs. 10,626 and a rough calculation was made of expenses for stamps and transfer fees, but it does not seem that the exact amount was arrived at, as the amount of stamps required depended on the number of shares sold on each transfer. As a matter of fact plaintiff 2 never went back to have the account settled. The sums of Rs. 6,000 and Rs. 4,500 were debited in the Bank's books to suspense account. On 6th August they were credited to suspense account and debited to the plaintiff in the Miscellaneous Ledger as if the money had been advanced by the Bank as a loan on security of the shares. In

August, warrants for dividend on the shares for the half-year ending 30th June were sent to plaintiffs 2, 3 and 4. Plaintiff 2 took these to Chunilal, who asked him to get them signed and returned to him as the purchasers were entitled to the dividends. As a matter of fact the amount of the dividends was credited to the plaintiff's account in the Miscellaneous Ledger. After the Bank went into liquidation, plaintiffs 2, 3 and 4 were placed on the list of contributories by the liquidator and they then discovered that the shares had never been sold so that their names still remained on the register of shareholders. Their claim to be removed from the list was disallowed and when the liquidator under an order of the Court made a call of Rs. 50 per share, plaintiff 1 had to pay Rs. 8,250.

The plaintiffs have now filed this suit to recover that amount, on the ground that the Bank became their agent for the sale of the shares and on account of the neglect and misconduct of the Bank's Managing Director the shares were not sold, so that as the direct consequence of that neglect and misconduct they had to pay the liquidator the amount of the call. The liquidator in his written statement disputed the facts which I have set out, relying on the entry in the Miscellaneous Ledger, but considering the entry in the register of the shares lodged with the Bank for sale and the receipts given to the Bank for the payment of Rs. 6,000 and Rs. 4,500, it cannot possibly be contended that the Bank made a loan on the security of the shares. It has also been contended that because in the register the column "rate at which the shares are to be sold" was not filled in in ink with "Market rate" but contained an entry in pencil "ask the Sheth," the plaintiffs lodged the shares to be sold only when Chunilal thought fit. I believe the evidence of plaintiff 2 and reject this contention. It is common knowledge now that Chunilal was interested in keeping up the price of the shares and it did not suit him to put these on the market. I think that when plaintiff 2 asked Chunilal to sell the shares without fixing any limit, it cannot be taken that it was implied that the shares should be sold at the market-rate, but the question is immaterial as I am satisfied that Chuni-

lal represented to plaintiff 2 that the shares had been sold.

It is not suggested that Rs. 66 was not the proper market value of the shares in May 1913. The direct consequence therefore of Chunilal's conduct was that the plaintiffs had got the money value of the shares while they still remained the owners of them. Mr. Desai admitted that if it was a question only of negligence on the part of the agent, the plaintiffs could not recover what they had to pay to the liquidator as contributories, and that seems clear from the case of *Neilson v. James* (1) where, through a broker's negligence in failing to make a complete contract for sale of certain shares, the purchaser repudiated the transaction, so that the seller did not get the purchase price and had to pay calls which were afterwards made on the shares. He was held entitled to recover from the broker the purchase price, but he gave up his claim for the amount which he had to pay for calls. The learned Judges in appeal were unanimously of opinion that the plaintiff had acted wisely in so doing. But Mr Desai argued that as Chunilal was guilty of misrepresentation the damages suffered by the plaintiffs must be assessed on a different basis. But even in the case of fraudulent misrepresentation there must be a natural and proximate connexion between the wrong done and the damages suffered. See per Thesiger, L. J., in *Waddell v. Blockey* (2). Blockey had represented to one Peter Lutscher that it would be profitable to buy $5\frac{1}{2}$ per cent rupee paper and was authorised to buy to the extent of £2,00,000. Lutscher thought that Blockey was buying for him in the ordinary course on the Stock Exchange. As a matter of fact Blockey was selling his own rupee paper. Price fell and Lutscher sold after five months at a loss of £43,000. The action was brought by Lutscher's trustee under a liquidation by arrangement. It was held by the appeal Court that Lutscher's ultimate loss was not the proper measure of damage. He voluntarily retained the paper and if he elected to remain owner after the paper began to fall in price, his loss was not owing simply to his having purchased it but to his having

purchased and retained it. The plaintiff was entitled to the difference between the purchase price and the price he would have realised if he had resold it in the market forthwith after purchasing it. Or according to Baggalay, L. J., the damages might have been assessed upon the basis of the difference between the price the insolvent paid and the price at which he might have bought in the market, assuming he could have bought at a lower rate.

Now the direct consequence of Chunilal's misrepresentation was that plaintiffs 2, 3 and 4 remained the owners of the shares in the Bank's register. They had got their money and therefore there was no loss to them in so remaining owners. Ostensibly they had got Rupees 10,500 for nothing. The real measure of damages would be the difference, if any, between Rs. 10,500 and the amount that would have been realised by an actual sale. The liquidation was due to the Bank having suffered losses and the call ordered by the Court was due to the facts that the Bank's assets were not sufficient to pay the creditors in full. Supposing they had been sufficient and there had even been a surplus the plaintiffs would have been entitled to share with the other shareholders. I may also add that plaintiffs 2, 3 and 4 had direct notice that their names remained on the register long after they thought the shares had been sold, at any rate, when the dividend warrants were sent to them in August. Plaintiff 2 is an educated and intelligent man, and he at least ought to have known that dividend warrants are made out in the names of those whose names appear on the register when the transfer books are closed prior to the payment of a dividend. It would be a very strange contradiction if the plaintiffs, having been placed upon the list of contributories in spite of certain facts and having paid the call, should be entitled on the same facts to recover the amount so paid to the liquidator in an action. I think the liquidator was wrong in contesting the facts and in relying on an obviously false entry in the Miscellaneous Ledger. The matter could well have been brought before me on a case stated. Therefore I dismiss the suit without costs.

G.P./R.K.

Suit dismissed.

1. (1882) 51 L J Q B 369=9 Q B D 546.

2. (1879) 4 Q B D 678=48 L J Q B 517.

A. I R. 1916 Bombay 135

BEAMAN AND HEATON, JJ.

Emperor

v.

Blanche Constant Cripps and another
—Accused—Respondents

Criminal Appeal No. 307 of 1916, Decided on 7th September 1916, from an order of acquittal passed by S. Judge, Ahmedabad.

(a) Penal Code (1860), S. 317—'Having the care of such child—Meaning of, stated.

Any person receiving an infant from its mother on the distinct understanding that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she has transferred it to the care and custody of some other person or institution. The shortness or temporary nature of the custody is immaterial and any exposure or abandonment by the person receiving the child is an offence under S. 317, I. P. C. [P 135 C 2]

(b) Penal Code (1860), S. 317—Person entrusted with custody of child for abandonment is guilty of offence under S. 317.

The mother is also guilty of an offence under Ss. 317 and 109, I. P. C., if she hands over the child so that it might be abandoned.

[P 135 C 2]

S. S. Patkar—for the Crown.

T. R. Desai—for Accused.

Beaman, J.—This is an appeal by the Government of Bombay against the acquittal of two women by the Sessions Judge of Ahmedabad. The offences with which they were charged were under Ss. 317 and 109, I. P. C. The facts, which are undisputed, are that the younger of the two accused persons, a girl of fourteen, became pregnant while still unmarried, and in order to conceal her shame from her parents with the connivance of the elder of the two accused her sister, she was conveyed to the civil Hospital of Ahmedabad where she was safely delivered of a child. As soon as she was sufficiently recovered, the two sisters agreed that it would be advisably to dispose of the child secretly. Accordingly, the young mother handed the child to her elder sister, who carried it by train to Mahomedabad where she left it in a second class compartment. The child was carefully wrapped up and a bottle of milk was left by its side, so that as soon as it was discovered by any one there should be means of feeding it.

These being the admitted facts, the learned Sessions Judge came to the conclusion that no offence had been committed by either of the accused persons. The mother, in his opinion, was the only

one of the two who had the care of the child and she neither exposed nor left it with the intention of wholly abandoning it. Her elder sister, according to the view taken by the learned Sessions Judge—a view which had formerly been expressed in the Madras High Court—was not a person having the care of the child within the meaning of the section because he was only entrusted with the child for the express purpose of exposing or leaving it. A further point has been argued before us, viz. that in any view neither of the accused had the intention of wholly abandoning the child. That, we think, is unnecessary to discuss. It is perfectly clear that having regard to the true objects of sections of this kind, we should not be too nice in fitting facts literally to the words of the section but look to them as a whole, and so looking at them we should have no hesitation whatever in saying that the intention of both the sisters was to get rid of the child, as far as they were concerned, that is to say, of wholly abandoning it without at the same time providing for its immediate protection and care by other persons. The first point however needs a little more consideration, although we have no doubt that the learned Judge was wrong. It is not so easy to demonstrate this by dialectical analysis. We cannot help feeling however that in cases of this kind any person receiving an infant from its mother on the distinct understanding, as in this case, that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution. The difficulty arises in cases where the care or possession—whatever term be used—intended by the mother, would be in the contemplation of both the persons concerned for an extremely short time. Suppose, for example, the mother desires to abandon her child and on that distinct understanding she requests another to leave it in a lonely field some two minutes' distance away, we are still of opinion that during that space of time, the second person carrying the child with no other object than that of exposing and leaving it in the appointed place would have the care of it suffi-

ciently within the meaning and contemplation of S. 317. This can be easily exemplified by retaining all other conditions but extending that of time. Suppose a second case in which the mother makes over her child in India to a person with the intention that second person should carry the child to South America and there abandon it. The intervening period might be several months and during the whole of that time the person in actual possession of that child would, in our opinion, have the care of that child within the meaning and contemplation of the section and we do not think that in such a case the facts would ever occasion any doubt or hesitation at all. But if we are right mere extension of time could not affect the underlying principle, and that principle again would have to be applied in each case with reference to its facts and also with that degree of commonsense which Judges of experience are supposed to exercise while administering the criminal law. It is sufficient for our purposes to look first at the real intentions of the persons and see whether they fall within the mischief which the particular section of the Penal Code is designed to strike at. If we needed confirmation of this view, we might look to the English Statute, where the case with which we are dealing has been expressly foreseen and provided for. There it is enacted that a person, situated exactly as the accused 2 was situated in this case, that is to say, having the de facto possession of the child has the care of the child for the purpose of the statute.

While therefore we think that the learned Sessions Judge was wrong in his law, we agree with him in his estimate of the moral guilt of the accused, and the learned Government pleader has been instructed merely to ask for an expression of the law from this Bench and not to press in any way for sentence. Being of opinion however that the acquittal was wrong the law compels us to convict and therefore to inflict some sentence. We reverse the acquittal and convict both the accused under Ss. 327 and 109, I. P. C., and direct that each of them do undergo one day's simple imprisonment. As we understand that the accused are in Bombay, the sentence will be sufficiently carried out by de-

taining them until the rising of the Court this evening.

Heaton, J.—I agree. I think this is a very pitiable case, one in which no possible object can be gained by imposing a substantial sentence. But I think the learned Sessions Judge was wrong in the view he took of the law. It seems to me that when accused 2, the elder sister, took or received this child from its mother and conveyed it to a railway carriage and then went off with it leaving the mother behind, she became immediately responsible for the well-being of the child. It does not matter that her ultimate object was to leave the child and return without it. She was nevertheless for the time being the person who had the care of the child, I think, within the meaning and intention of these words as used in S. 317, I. P. C.

G.P./R.K.

Acquittal reversed.

A. I. R. 1916 Bombay 136

SCOTT, C. J. AND HEATON, J.

Pranjiwandas Kalidas and others—
Defendants—Appellants.

v.

Shamkorebai—Plaintiff—Respondent.
Original Civil Appeal No. 45 of 1915,
Decided on 8th February 1916.

Deed—Construction of—Property divided in three lots—Limitation as to one applies to others and addition of words is permissible if necessary.

In construing a deed of trust, whereby certain property belonging jointly to three brothers is divided into three lots and one lot is allotted to each of the brothers and a limitation is provided as to the share of the first deceased brother but not as to the others, the limitation regarding each scheduled share should be read alike and if such a reading necessitates the addition of some words to the deed, it is permissible: *Greenwood v. Greenwood*, (1877) 5 Ch. D. 954, *Ref.*

[P 138 C 1]

Kanga and Inverarity—for Appellants.
Setalvad, Desai and Moos—for Respondent.

Judgment.—We have to construe a deed the purport of which may be briefly summarised thus: There were three brothers, Vasta, Kalidas and Narsi, sons of Kallianji. They were the principal parties to the deed which was executed on 8th September 1887. The deed provides that the property of the brothers, which is described as joint family property, is divided into three separate lots, one for each brother. There is also a

house for residence and some provision for charity, but that is immaterial for the present purpose. The whole property is vested in four trustees out of whom the brothers are three. The object of the trust is thus described :

" And whereas the said three brothers, Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji, are desirous of apportioning all and singular the said immovable properties, all of which are of the estimated value of Rs. 64, 392, for the benefit and use of themselves jointly during their joint lives, and afterwards for the benefit and use of the survivor of them and of the family or families of such of them as may have predeceased and after the decease of the last survivor of them for the benefit and use of the respective families of each of the said three brothers in manner hereinafter appearing and for certain charitable purposes."

Then one of the lots which are entered in detail in Schs. A, B and C, is recited to have been allotted to Vasta, another to Kalidas and the third to Narsi. The operative part contains certain provisions as to residence and charity. Then comes this provision :

" The said trustees shall hold and stand possessed as regards the several hereditaments and premises described in Schs. A, B and C hereunder written upon trust to recover, receive, collect and take the rents and profits thereof and pay the same after defraying all outgoings to them the said Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji jointly for the use of themselves and their respective families during the joint lives of them all."

Next comes the provision for what is to be done after the death of any one of the three who may die first. Broadly speaking, each of the two surviving brothers is to be paid separately the rents and profits of his lot so long as he lives, and elaborate and special provision is made as to what the trustees are to do with the profits of the lot of the brother who dies first. There is no provision for what is to happen as regards the lot of the brother who next dies, when he dies; and similarly when the third brother dies. The specific trust continues in regard to the lot of the brother who dies first, but there is no specific trust in regard to the lots of the brothers who die second and third, after the death of each; though there may be a resulting trust. What has happened is this : all the brothers are now dead. Vasta and Narsi left no issue. Kalidas, who died last in 1910, left three sons living and the widow of a fourth son who predeceased him. The widow sues and claims as an heir, one-fourth share of the profits of the

portion of the lot which constituted the share of Kalidas according to the deed, i. e., of the profits of the properties described in Sch. B. The defendants, the three surviving sons of Kalidas, oppose the claim. The trial Court decreed the claim and the defendants have appealed. The trial Judge wrote as follows :

" I do not think there can be any doubt that the trust was to Kalidas for life, remainder to his sons for life, remainder to their heirs. If any son of Kalidas dies in the lifetime of Kalidas, his heirs take his place, and on death of Kalidas succeed to that son's life estate, just as the heir of a son of Kalidas dying after the death of Kalidas would take for life that share."

But he did not give detailed reasons for his decision. The exact terms of the operative provision in respect of each lot are as follows *mutatis mutandis* :

" And further to pay and apply the rents and profits of the hereditaments and premises described in Sch. B hereunder written after making suitable provision thereout for repairs, maintenance, taxes and all outgoings payable for the said premises to the said Kalidas Kallianji if he be one of the survivors of them three, the said Vasta Kallianji, Kalidas Kallianji and Narsi Kallianji, for his natural life and if he be not one of such survivors then to the son or sons of the said Kalidas Kallianji and if more than one in equal shares for their respective natural lives, and after the death of the last survivor of such sons in trust to apportion or sell the said several hereditaments and premises described in the said Sch. B hereunder written, and in the event of a sale to divide the proceeds thereof amongst the respective heirs of such son or sons of the said Kalidas Kallianji per stirpes, provided always that on the death of any son of the said Kalidas Kallianji during the life time of his brothers the heirs of such deceased shall until final division as aforesaid be entitled to be paid by the said trustees the proportionate share of the said rents and profits which such deceased son himself would have been entitled to, if alive."

It is contended that the provisions in the operative part of the deed should be expanded by reference to the recital which purports to express the desire of the settlors in making the settlement. That recital is, as I read it, of a desire to apportion the properties in Sch. A, B and C among the three settlors for the use and benefit of themselves jointly during their joint lives and afterwards for the benefit and use of the survivor of them (i. e., the three settlors) and of the family or families of such of them as may have predeceased and after the decease of the last survivor (of the three settlors), for the benefit and use of the respective families of each in manner thereafter appearing. In other words, the joint user is to continue till the death of the last of the three settlors and the distri-

bution into severalty according to the schedules among the respective families of each is to be postponed till that event. But the Court is not agreed as to the intention expressed in this recital. In the view above expressed the operative provisions of the deed depart from the proposed intention treating the settled properties as to be enjoyed jointly only until the death of the first dying of the three settlors. I think therefore the construction of the operative provisions will not be advanced by reference to the recital.

Upon the operative part, in so far as it concerns the scheduled share falling to Kalidas' family, two questions arise: first, does the remainder in favour of his sons take effect only if he is the first settlor to die or does it take effect on his death at any time; and, secondly, does the substitutionary proviso in favour of the heirs of a deceased son apply to the heirs of a son predeceasing Kalidas? In my opinion both questions should be answered in favour of the respondent. As regards the first question, the joint enjoyment by the three brothers of the scheduled property is necessarily broken by the death of any one of them, and two alternatives would then naturally arise: either the sons of the first deceased brother would then take his scheduled share or the joint tenancy of such sons and their uncles would continue for the lives of the other surviving settlors. The operative clause however clearly provides for the sons of the first deceased brother taking their father's scheduled share. It cannot however have been the intention that the limitations regarding each scheduled share should not be read alike, viz., that on the death of each brother, his scheduled share should go to his family. Such a reading necessitates the addition of the words "or having survived he die" after the words "one of such survivors." It appears to me that this is permissible in the circumstances—a similar case is *Greenwood v. Greenwood* (1) where under a bequest in trust for the testator's widow for her life in trust for her children, followed by power of maintenance and advancement after the widow's death with an ultimate gift over after her death in default of children attaining vested interests, the Court supplied

1. (1877) 5 Ch D 954=47 LJ Ch 298.

the words "and after her death" after the words "for her life." As regards the second question, the words are: "on the death of any son of the said Kalidas during the lifetime of his brothers the heirs of such deceased shall until final division be entitled"

This substitution is not limited in terms to heirs of sons surviving the testator; the only condition being that the heirs should be of a son of Kalidas predeceasing his brothers. Naturally every son of Kalidas must predecease the last surviving brother whose death marks the period of division and distribution. We have in a subsequent provision regarding the expectant shares of minors an indication that on the death of Kalidas as also of his brothers' "remoter issue" (presumably remoter than sons) might in the contemplation of the settlors be entitled in expectancy to a share of the trust funds. This would only be possible if the substitutive proviso included sons predeceasing Kalidas. The result is in accord with the conclusion arrived at in the lower Court. We affirm the decree and dismiss the appeal. We make no order as to costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 138

BEAMAN AND HEATON, JJ.

Kashinath Krishna Joshi—Defendant
—Appellant.

v.

Dhondshet Bhawanshet Shetye—Plaintiff—Respondent.

Second Appeal No. 1118 of 1915, Decided on 14th August 1916, from decision of Dist. Judge, Ratnagiri, in Appeal No. 238 of 1914.

Civil P. C. (1908), S. 11—Khoti lands sold in execution — Judgment-debtor suing to recover possession on ground of non-transferability—Suit is barred—Khoti Settlement Act (1 of 1890), S. 9.

Certain khoti lands belonging to plaintiff were sold in execution of a decree obtained by defendant against plaintiff and were purchased by the former. Plaintiff subsequently sued to recover possession of the lands on the ground that they were occupancy lands and were not transferable under S. 2, Khoti Settlement Act.

Held: that as the sale in execution decided as between the plaintiff and defendant that the lands sold were not occupancy lands, the plaintiff could not be allowed to reopen that question. (P 189 C 1)

V. B. Virkar—for Appellant.

P. B. Shingne—for Respondent.

Beaman, J.—We have had a very full and interesting argument upon the two

points raised in this appeal, viz., whether the plaintiff's contention, which succeeded in the Courts below, is not *res judicata* against him, and whether his prayer to have the sale of 1912 set aside is not time-barred. We are of opinion that this is not a case of an alleged *res judicata* against a Statute, and we are therefore not called upon to examine certain cases which have been cited to us and which, on a first view, may appear to be in conflict. What we think clearly was *res judicata* here was the question of fact raised again by the plaintiff in this suit and decided in his favour, viz., whether or not the lands sold at the Court-sale of 1912 were occupancy lands within the prohibition of S. 9, Khoti Settlement Act. That was a point which the plaintiff, if he meant to rely upon it at all, was bound to take we think, at the time the Court proposed to sell the land in suit. It is not as though it was then admitted that the lands to be sold were occupancy lands. Had that been so, no Court could have been found to sell them in the face of the direct prohibition of the legislature. When therefore we find the Court selling these lands without any challenge by, or protest on behalf of, the judgment-debtor, we take it that they must have been sold on the basis of the judgment-debtor having a saleable interest in them. *Omnia praesumuntur rite esse acta*. Inferentially, then, the sale of 1912 decided as between the plaintiff and the defendant, that is to say, the judgment-debtor and judgment-creditor, that the lands sold were not occupancy lands. Here the plaintiff has brought the suit to have it established that they were, and he was allowed to raise that question of fact and the whole case has turned upon the answer to it. It is precisely that part of the plaintiff's present suit which, in our opinion, was *res judicata* within the language and spirit of S. 11, Civil P. C.

Much has been said here upon the applicability of certain rules in O. 21 to the case of a judgment-debtor. Mr. Shingne argued that part of the respondent's case with very great thoroughness and ability, and for my part I am very clearly of opinion that none of those rules were ever intended to apply to the judgment-debtor himself. It is not upon that ground that we think the plea of

res judicata is here established so much as upon general principle and having regard to what is in controversy, what was and is to be inquired into and what has in fact been finally determined in this case by the executing Court between the executing creditor and judgment-debtor. The present suit is really a continuation of that execution proceeding or at any rate has been treated as such in both the lower Courts. The parties are therefore the same and what has resulted is that a question of fact, which, as we have shown, was decided, if not explicitly yet by necessary implication, between them in 1910, has been allowed to be re-opened and investigated and adjudicated upon a second time. That being so, we have little hesitation in coming to the conclusion that the appellant's contention upon this point is sound and must prevail. It becomes therefore unnecessary to go into the second equally interesting point of limitation upon which the appellant has relied. We think that the appeal must be allowed and the plaintiff's suit dismissed with all costs on him throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1916 Bombay 139

BATCHELOR, AG. C. J. AND SHAH, J.

Raghavendra Raoji Kathawate—Defendant—Applicant.

v.

Yalgurad Ramchandra Padki—Plaintiff—Opposite Party.

Civil Exn. Appln. No. 126 of 1916, Decided on 15th September 1916, from decision of Dist. Judge, Bijapur, in Appeal No. 95 of 1914.

Civil P. C. (5 of 1908), O. 8, R. 6—Suit for accounts—Set off for wages can be claimed—Parties' character is not changed.

In a suit based on an account the defendant is entitled to claim that the pay or wages due to him by the plaintiff should be set off as against the plaintiff's claim, as the personal capacity of the parties is not varied in both the claims.

[P 140 C 1]

G. S. Mulgaokar—for Applicant.

H. B. Gumaste—for Opposite Party.

Judgment.—The District Judge here has reversed the decree of the learned Judge of trial, because in the District Judge's view of the question of law it was not open to the defendant to urge by way of set off the claim which he did urge, that is to say the claim that the am-

ount of pay due to him by the plaintiff should be reckoned against the sum due to the plaintiff by him on the accounts. The District Judge's view was that the plaintiff and the defendant did not fill the same character in regard to the attempted set off as they filled in the suit, and therefore R. 6, O. 8, Civil P. C., could not be applied. But looking to the illustrations of this rule, and in particular comparing illustrations (a) and (b) with illustration (e), it appears to us that the District Judge has misunderstood the provisions of the law. It is quite true to say that in regard to the plaintiff's suit the plaintiff's claim is based upon an account for goods supplied, whereas the claim attempted to be made by a way of set off is in regard to wages due. But in regard to both these claims the capacity of the parties is not varied. The capacity in both the cases is nothing but the personal capacity, the claims being based upon a money demand. We make the rule absolute, set aside the District Judge's decree and remand the appeal to the District Judge to be decided on the merits. All that we have here decided is that under O. 8, R. 6, it is competent to the defendant to urge by way of set off the claim which he seeks so to urge. Costs in the appeal.

G.P./R.K.

*Rule made absolute.***A. I. R. 1916 Bombay 140**

KEMP, J.

Abdul Latiff Shaik Hussein—Plaintiff.

v.

Pauling & Co., Ltd.—Defendants.

Ordinary Original Civil Suit No. 415 of 1916, Decided on 9th November 1916.

(a) **Tort — Negligence — Railway contractor's liability to public — No duty nor privity of contract exists — Contract with railway does not absolve the latter — Contractor is however liable for neglect of his servants in use of line contrary to contract with railway.**

Defendants were contractors carrying out work for a railway company who had constructed two lines for their use. These lines crossed a highway, but no gate or gateman was provided at the crossing. The trucks and engines working on the line were under the control of the defendants, who had agreed with the railway company to take precautions to safe-guard the public by proper watching and lighting. Plaintiff's motor car was proceeding along the road at midnight and on approaching the level-crossing, the driver saw some trucks moving along the line crossing the road and in order to avoid a

collision he swerved to the left and ran into a heap of stones, causing damage to the car;

Held: (1) that the defendants' agreement with the railway company to take proper precautions could not relieve the company of responsibility to the public, nor could it entitle persons using the highway to sue the defendants for failure to perform the duty cast upon the company and that therefore the plaintiff had no right of action against the defendants, so far as the omission to provide gates and proper lighting was concerned, inasmuch as there was no privity of contract between the defendants and the plaintiff nor any duty from the defendants to the plaintiff in this respect; (2) that the defendants were however liable to the plaintiff for the negligent act of their servants in the course of the user of the railway lines crossing the road: *Donovan v. Laing*, (1893) 1 Q B 629 and *Rourke v. White Moss Colliery Co.*, (1877) 2 C P D 205, *Ref.* [P 141 C 2; P 142 C 1]

(b) **Tort — Negligence — Greatest care is expected of engine driver using line laid across a highway.**

The driver of an engine about to cross at midnight an unfenced level crossing laid across a public highway should exercise the greatest amount of care. [P 142 C 1]

Davar and Strangman—for Plaintiff.*Campbell and Jardine* — for Defendants.

Judgment. — Plaintiff's suit is for damages sustained by his motor car which on or about midnight on 3rd June 1915 was being driven from Panwel to Mumbra on the Poona-Bombay road, and at the railway crossing near Mumbra, shown on the plan marked Ex. 1, was forced by the sudden appearance of an engine and trucks crossing the road to swerve into a heap of stones on the left of the road. The locality as well as the spot of the accident is clearly indicated on the plan which therefore renders it unnecessary to give any further description of the place. The defendants are contractors who were at the time carrying out the work for the Great Indian Peninsula Railway of removing the spoil from the tunnel shown on the left of the Poona-Bombay road and dumping it down on the bank at the Diva side of the Mumbra creek bridge. For this purpose, two lines marked on the plan in blue ink had been laid down by the railway company, the line on the Bombay side of the railway line being known as the main line and the other as the office line. The points for these lines were on the creek side of the road.

Plaintiff carries on the business of running a motor car service between Panwel and Mumbra, and his case is that

on the night of 3rd June 1915 his service car was being driven with passengers along the Poona-Bombay road and as it approached close to the level crossing, certain trucks which were on the creek side of the crossing suddenly began to move across the road, with the result that the driver of the car had to swerve to his left to avoid a collision and ran into the heap of stones causing the damage complained of. Plaintiff suggests that the trucks were being pushed in front of an engine. Defendants' case is that plaintiff's driver was driving negligently and that the trucks referred to by the plaintiff were on the tunnel side of the road, and the engine, which had dragged some trucks from the tunnel and uncoupled them, then proceeded across the crossing to the points and on its return as it approached the crossing blew its whistle twice and stopped on the approach of the car. Defendants also say that plaintiff's driver was driving fast as the car approached the crossing and that if he was unable to pull up in time to avoid a collision, that was due to the carrying more passengers than it was licensed for. They also plead they took every precaution to avoid danger to traffic at the crossing and that plaintiff's driver was guilty of contributory negligence such as would disentitle plaintiff to recover damages.

That is a short summary of the contentions on each side. It may further be stated that the defendants were doing this work under a contract with the Great Indian Peninsula Railway under which the railway company supplied them with the lines, engines, and trucks, and it is admitted by Mr. Campbell, for the defendants, that these were then being used by the defendants for their work and were under their control. The particular work in question was an extension of the work which defendants had agreed to do for the railway company under an agreement of 4th April 1913, which has been put in and marked Ex. 3 in this case. The correspondence relating to this extension work has been put in as Ex. 4 and to my mind it clearly contemplates that this extended work was to be done under the same agreement Ex. 3. The correspondence, Ex. 4, merely states the rate on dumping the spoil from the tunnel

with the addition of a clause that defendants are not to be liable for damage or loss of rolling stock through the sudden subsidence of the bank, and that the rate is to include the supply by the railway company of engine power and rolling stock.

As the performance of this work would entail the engine and trucks crossing the level crossing, it is only natural to suppose the same terms in the agreement Ex. 3 regarding the precautions to be taken by defendants to guard the crossing were intended to be embodied in the agreement for the extra work. By Cl. 7, part 1 of the Schedule to that agreement, defendants agreed with the railway company to take proper precautions to safeguard the public by proper watching and lighting, and the duty to the public that is thus cast upon a railway company of safeguarding persons using the highway over a railway crossing was by contract between the railway company and the defendants thrown upon the latter. This however would not relieve the railway company of responsibility to the public nor would it, in my opinion, so far as the public are concerned, entitle persons using the highway to sue the defendants for failure to perform the duty cast upon the railway company, there being no privity of contract between the defendants and the plaintiff nor any duty from the defendants to the plaintiff in this respect.

So that so far as the omission to provide gates and proper lighting and observation at this crossing is concerned, the plaintiff, it seems to me, has no right of action against the defendants. This however does not dispose of the suit for it is admitted that the engine and rolling stock and the lines were, at the time of the accident, under the control of the defendants. And it is immaterial, in order to fix defendants with responsibility for negligence, that the engine driver and porters engaged were paid by the railway company if at the time they were acting under the order of, and subject to the control of, the defendants: *Donovan v. Laing* (1); *Rourke v. White Moss Colliery Co.* (2). So that whilst the plaintiff may have no right of action against the defendants for the omission to keep the level crossing properly guar-

1. (1893) 1 Q B 629.

2. (1877) 2 C P D 205.

ded, he may still have a right of action against them for the negligent act of the defendant's servants in the course of the user of the railway lines crossing the road. And I can conceive no stronger case in which care should be exercised by the driver of an engine than that in which he proposes to cross at midnight an unfenced level crossing laid across a public highway.

The precautions which the defendants were in the habit of taking when moving their engines and trucks across this public highway are detailed in their letter to the District Superintendent of Police, dated 24th June 1915 (Ex. E). They appear to me hopelessly inadequate. According to that letter no regular watchmen are appointed to guard the level crossing, but at night time when the locomotive is approaching the crossing the train attendant goes ahead with a signal lamp and stands at the crossing until the engine is passed. Apparently the defendants themselves felt their precautions were somewhat insufficient, as the letter goes on to state that except on very rare occasions the locomotive has not occasion to pass the crossing twice from nightfall to daybreak. It comes to this that the only precaution that the defendants took to signal to the public that the engine was about to cross the road—apart, I suppose, from the usual procedure of blowing a whistle, was to send a man ahead with a lamp. And this moreover in the case of a crossing known to be open and without gates.

The engine-driver states that there was a porter at the time with a white light in his hand and that the engine had a red light on its right hand buffer and another on the rear of the tender. He admits however that the red lights were shaded at the sides and they would therefore be invisible to any one approaching the engine at right angles. They are indeed only intended for warning persons on the line of the approach of the engine. He says he blew his whistle when he reached the points and then again his danger whistle when he was five or six feet from the crossing and saw the car approaching. It seems to me that the latter blast could have had little effect under the circumstances to avoid the danger of a collision, for it would have been sounded too close to the

crossing to give a car near the crossing sufficient warning of its danger. The porter Ramsudan Ramdas says he was at the crossing itself with a white lamp and showed it. It is clear he was actually on the crossing and not where he should have been, viz., some distance from it to warn approaching traffic. The effect of the evidence of the fireman and the oilman is the same. If believed, it all comes to this, that a porter stood on the crossing and when he saw the car approaching showed a white light, whilst the engine, admitted by the engine-driver to be invisible on that dark night at any distance, blew its whistle once at the points and again a danger whistle five or six feet from the crossing. I disbelieve the evidence suggesting the car was approaching at a very fast rate. It was a dark night and no driver would rush at a railway crossing at a high rate of speed. I consider that even if the defendants' evidence is to be believed, it shows that the precautions which the engine-driver, porter, etc., took to warn traffic along the road that the engine was about to cross the highway, were quite inadequate. They knew the crossing was an open one and that the engine was invisible except when very close, and the blowing of a danger whistle five or six feet from the crossing and the showing of a white light on the crossing itself do not, in my opinion, show that proper warning was given to the car of the approach of the engine.

The plaintiff's driver says he had no warning until the trucks began to move across the line. It will be remembered the defendants' case is that the engine and trucks were separated by the crossing at the time, although in para. 5 of the written statement it is stated the engine was dragging the trucks. The plaintiff's driver says the engine was pushing the trucks. It is difficult to decide which of these various versions is correct. In any event, on defendants' own evidence there were trucks there close to the crossing which the plaintiff's driver saw and there was admittedly an engine moving until it reached the crossing itself and if the plaintiff's driver thought in the sudden realization of his danger that the trucks were being pushed by the engine, it cannot be wondered at and does not, to my mind, affect the merits of plaintiff's case, which is in effect that the man-

oeuvres of those in charge of the engine and trucks were such as to justify the step he took of swerving off the road. I agree that he took the proper course and one that any other cautious driver would have taken under the circumstances. It was better to swerve off the road than to risk the chance of dashing into the engine or trucks if not able to pull up in time. He might have tried to pull up by putting on all his brakes. Whether he would have succeeded in stopping the car to avoid an accident if he had put on the brakes, I cannot tell but I would say on the evidence, probably not. And that he did one thing and not the other is no ground for suggesting that what he did was wrong and in any event a man suddenly confronted with imminent danger, as was the case here, cannot be expected to exercise the same careful discrimination as to the correct course to pursue that he otherwise should. The doctrine of contributory negligence has no application under the circumstances.

It has also been argued that some 200 yards up the road on either side of the crossing was a danger sign post warning cars approaching the crossing, but on a dark night that would be invisible to any one unacquainted with the road whilst as to persons who knew the road and the crossing, like plaintiff's driver, it would make no difference having regard to my finding that the car was not approaching this crossing at a high rate of speed. Naturally, most of the plaintiff's witnesses cannot testify to the facts immediately preceding the accident, as they were passengers in the car whose first intimation of the danger was the sudden swerving of the car off the road. The plaintiff's driver has not produced his license. It may be that he had not got it extended. It is improbable he had not got one, as although the incident was reported to the police no steps seem to have been taken against the driver on account of anything wrong with his license. And, in any event, even if he had no license, provided he drove carefully on this occasion as I find he did, the mere absence of a license would not justify those acting under the defendants' control and orders from exercising any less care towards him than towards a driver who had a license.

[After answering the issues his Lord-

ship directed the suit to proceed on the issue of damages].

G.P./R.K.

Suit decreed.

A. I. R. 1916 Bombay 143

BEAMAN AND HEATON, JJ.

Ganesh Vinayak Joshi—Defendant—Appellant.

v.

Sitabai Narayan Joshi—Plaintiff—Respondent.

Second Appeal No. 478 of 1915, Decided on 11th September 1916, from decision of Asst. Judge, Thana, in Appeal No. 108 of 1914.

(a) **Limitation Act (9 of 1908), Art. 131—Recurring right—When barred—Limitation does not begin without proof of demand and refusal—Mere omission to sue does not bar—It is analogous to rent.**

In order that a recurring right should be time-barred under Art. 131, Lim. Act, it is necessary for the defendant to show that there was a definite demand and refusal. Mere omission on the part of the person having the right to exercise it will not start a period of adverse possession under the article. A suit to enforce such a right is exactly on all fours with an ordinary suit for rent where the landlord has, for many years, made no demand. [P 144 C 2]

(b) **Grant—Inam—Inamdar is entitled to customary rent in absence of contract in lands assessed to Government judi.**

In cases of lands in alienated villages upon which Government of judi has been calculated and which are not in the actual possession of the inamdars themselves, the tenants are liable to pay the dhara or customary rent to the inamdars, assuming that there has been no survey and assessment or contractual rent agreed upon to be paid to the inamdars. [P 144 C 1]

(c) **Limitation Act (9 of 1908), Art. 131—Right to customary rent is recurring right.**

This right to the customary rent is a recurring right falling within the contemplation and language of Art. 131, Lim. Act, and time runs for the exercise of the right from the date of a definite demand and refusal. [P 144 C 2]

S. Y. Abhyanker for *S. R. Bakhle*—for Appellant.

P. B. Shingne—for Respondent.

Beaman, J.—This case has occasioned us much difficulty, partly because the pleadings in themselves are very far from precise, partly because on a first view the issues seem to throw the onus upon the wrong party and partly because both the learned Judges, who have dealt with the case, being versed in matters of this kind, particularly Mr. Saldanha who has exceptional knowledge and experience of inam and khoti cases, have apparently felt no doubt or difficulty whatever in deciding in favour of the plaintiff. It is true that the trial Judge,

in order to elucidate the pleadings, felt obliged to examine both the plaintiff and the defendant, and we understand the process of his reasoning upon that additional material to have been something of this kind. The plaintiff is admittedly one of two inamdars of the village in which the land is situated. The land in suit is admittedly land upon which the Government judi has been calculated, and it appears to be virtually an admitted principle, or if not admitted, then well-established by legal decision, that all lands in such villages not being in the actual possession of inamdars themselves and falling under the calculation of Government judi are liable in turn to pay customary rent, assuming that there has been no survey and assessment or contractual rent agreed upon, to the inamdars who are directly liable to Government for the judi. Having arrived at that position, the learned trial Judge, perhaps rightly, though on this we express no confident opinion, framed an issue throwing the whole burden of proof upon the defendant. He called upon the defendant to show that on the facts admitted, the land in suit was exempt from the payment of customary rent to the plaintiff. Now the defendant being thus put to his defence and aware of the form of the issue, it became specially incumbent upon him, if he really relied upon any such plea, to give the Court ample information. He however never more appeared to conduct his defence. The result is that the record is confined to the statements of the plaintiff and defendant taken before the issue was framed. Yet neither the learned trial Judge nor the learned Judge of first appeal appear to have entertained the very least doubt; but that upon the facts so disclosed this land was liable to the plaintiff, as one of two inamdars, who had paid the judi to Government for half the customary rent, and in the circumstances we have stated, particularly in the absence of all evidence led by the defendant, we do not feel we are in a position to disturb findings so confidently reached.

The only point upon which we have felt some doubt at a later stage of the case was whether, on the plaintiff's admission that no dhara or assessment or customary rent, whichever term be preferred, has been levied for the last thirty-

five years, the present suit was within time. Here again the learned Judge of first appeal seems to have felt no doubt and the reason is, we think, that this must be treated as a recurring right falling within the contemplation and language of Art. 131. In order that such a recurring right should be time-barred, it is necessary for the defendant to show, as we held in a recent case, that there has been a definite demand and refusal. Mere omission on the part of the person having such right to exercise it, will not start a period of adverse possession under Art. 131. It is exactly on all fours with an ordinary suit for rent where the landlord has, for many years, made no demand. In all such cases, unless there has been an express repudiation of the landlord's title and an open declaration that the lessee holds adversely in interest to his original lessor, I am not aware that a suit for rent has ever been held time-barred, merely because rent has not been paid over a long period. That being our view upon the special point of limitation, we think that the suit is within time, and we must now hold that the appeal fails and must be dismissed with all costs.

Heaton, J.—I agree to the order proposed and entirely concur with the views expressed by my learned colleague generally and especially on the point of limitation. I think it probable that had I been the Judge of first instance, I should have framed the issues which the defendant asked for. But I confess I do not feel that I can say with confidence that the Judge was indubitably wrong in refusing to frame them and whatever may be the error in the decision arrived at, if there is an error, it is undoubtedly due to the negligence of the defendant in declining to produce whatever evidence he had and to put his case fully before the Court.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 144

SCOTT, C. J. AND HEATON, J.

R. K. Motishaw & Co.—Detendants—Appellants.

v.

Mercantile Bank of India, Ltd.—Plaintiffs—Respondents.

Original Civil Appeal No. 63 of 1915,
Decided on 23rd March 1916.

(a) **Bill of exchange—Declaration of war—Effect of stated—Consignment of goods—Acceptance—Effect of, stated—Negotiable Instruments Act (1881), Ss. 32 and 43.**

A German resident in Hamburg drew a bill of exchange upon the defendants on 24th June 1914 in favour of the plaintiffs for a certain amount payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be drawn upon the defendants against 50 bales of goods bearing a certain mark per S. S. Lichtenfels, a German steamer. It was presented with the shipping documents and accepted on 20th July 1914 payable at the office of the plaintiffs in Bombay. The S. S. Lichtenfels reached Bombay just before the outbreak of the war and in order to evade capture left Bombay and took shelter in a neutral port. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. The plaintiffs brought this suit, alleging that the British Government had made arrangements by which consignees of cargo per S. S. Lichtenfels could obtain delivery and they averred their readiness and willingness to hand over the documents against payment of the amount due under the bill.

Held: that the plaintiffs were entitled to succeed, inasmuch as if the acceptance was unqualified the defendants were bound to pay on the due date, and if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation dated 12th December 1914, whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports.

[P 146 C 2]

(b) **Royal Proclamation (12th December 1914) has no retrospective effect.**

The Proclamation of 12th December 1914 is not retrospectively operative for the purpose of validating a contract rendered invalid by the war but operates to permit performance, before it is too late, of the condition alleged; *Robinson v. Reynolds*, (1841), 2 Q B 196; *Thiedemann v. Goldeckmidt*, (1859) 1 De G F & J 4; *Leather v. Simpson*, (1871) 11 Eq 398; *Smith v. Aertue* (1860) 30 L J C P 56; *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex 164, *Ref.*

[P 147 C 1]

Jinnah—for Appellants.

Strangman and Campbell—for Respondents.

Judgment.—The plaintiffs are a British Bank carrying on business in Bombay. The defendants are firm of merchants, British subjects, carrying on business also in Bombay. On 24th June 1914, George Alberti, a German, resident in Hamburg, drew a bill of exchange upon the defendants in favour of the plaintiffs for £65-0-6 payable at thirty days' sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised. The bill purported to be

drawn upon the defendants against 50 bales of goods bearing a certain market per S. S. Lichtenfels, a German steamer. The plaintiffs allege, and it is not disputed that the bill was purchased by them in London for its full value and sent out to the plaintiffs in Bombay. It was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill. It was accepted on 20th July 1914 payable at the office of the plaintiffs in Bombay. The bill therefore would fall due for payment on 22nd August. The S. S. Lichtenfels reached Bombay just before the outbreak of war and in order to evade capture left Bombay and took shelter in the neutral port of Marmagoa, where she has since been lying. The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non-payment. This suit was filed on 30th September 1915, and it has been alleged in the plaint that the British Government had made arrangements by which consignees of cargo per S. S. Lichtenfels can obtain delivery, and the plaintiffs averred their readiness and willingness to hand over the documents against payment of the amount due under the bill.

The defence is contained in para. 4 of the written statement. It is to the following effect—that the documents consist of an invoice signed by an alien enemy, a bill of lading signed by the captain of a German steamer with a blank endorsement thereon by an alien enemy, and an open policy of insurance of the North China Insurance Company countersigned by a German firm; and the defendants submit that the acceptance was a qualified acceptance, subject to the condition that the documents should be tendered to the defendants by the plaintiffs and that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading on C. I. F. C. I. terms. They admit the presentation of the bill for payment on due date, but submit that war having broken out in the meantime and in view of the Royal Proclamation issued on 5th August 1914 and the Ordinances and Orders issued by the British and Indian Governments, the defendants were precluded from accepting the shipping documents tendered,

against which the payment of the bill was asked for, and that consequently it became impossible for the plaintiffs to perform their part of the contract subject to which the defendants accepted the bill of the exchange,

The Proclamation relied upon was published in Simla on 10th August 1914 and in Bombay on 13th August. It warns all persons not to obtain from the German Empire any goods, wares or merchandise, or obtain the same from any person resident, carrying on business, or being therein; nor to trade in any goods, wares or merchandise coming from the said Empire, or from any person resident, carrying on business, or being therein; nor to enter into any new commercial, financial, or other contract with or for the benefit of any person resident, carrying on business, or being in the said Empire. By a Proclamation, dated 12th December 1914, all British subjects residing or carrying on business in British India were authorized to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy country. At the time of suit therefore the plaintiffs were in a position to tender documents to the defendants under which the latter would be able to get delivery of the goods referred to therein.

The plaintiffs contend that the defendants' acceptance was unconditional and that, as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for payment, they are entitled to payment according to the terms of the bill and the acceptance.

They rely upon the cases of *Rotinson v. Reynolds* (1), *Thiedemönn v. Goldschmidt* (2) and *Leather v. Simpson* (3), all cases of bills drawn against bills of lading found to be forged and presented by indorsees for value. It is doubtful whether these cases can be used in favour of a party to a negotiable instrument. The plaintiffs here are the payees for whose protection the bill of exchange was drawn. The law applicable to the case is contained in Ss. 32 and 43, Negotiable Instruments Act. S. 32 provides:

"In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound

to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand", and S. 43 provides:

"A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration or for a consideration which fails, creates no obligation of payment between the parties to the transaction."

The drawee's acceptance here may be regarded from two points of view. The plaintiffs say it is an unqualified and absolute acceptance, as the acceptor has added no qualifying words. The acceptor says it is qualified being drawn on him against goods and he need not pay till he is put in a position to receive the goods. From either point of view the plaintiffs are entitled to succeed. If the acceptance was unqualified the defendants were bound to pay on due date; as Beaman, J., said:

"they accepted unconditionally the obligation to repay the moneys advanced really on their account by the Bank to Alberti before the war broke out,"

if the acceptance was qualified they were bound to pay "at or after maturity" when the money was demanded after the Proclamation of December whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports. Time is not of the essence and the claim of the plaintiffs may be enforced so long as it is not barred by limitation: see *Smith v. Vertue* (4).

It was contended on the authority of *Mirabita v. Imperial Ottoman Bank* (5) that the property had not passed to the defendants who would not be entitled to claim the goods from the S. S. Lichtenfels as owners. But it is stated by Cotton, L. J., in the case cited that

"if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him."

That is precisely the case here. The vendor dealt with the plaintiffs and drew the bill of exchange in their favour only to secure the contract price, which was to be treated in the defendants' accounts as paid to the vendor: therefore, on payment to the plaintiffs the defendants can claim the goods. The fact that by the declaration of war the German ship-

1. (1841) 2 Q B 196=1 G & D 526.

2. (1859) 1 De G F & J 4=1 L T 50.

3. (1871) 11 Eq 398=40 L J Ch 177.

4. (1860) 9 C B (n s) 214=30 L J C P 56.

5. (1878) 3 Ex 164=47 L J Ex 418.

owner's contract became void is not conclusive of the case, as it was in *Esposito v. Bowden* (6), followed in the recent case of *Karberg v. Green* (7). The contract here was between the British acceptor and the British payee, subject possibly to a condition which might be fulfilled after due date. All that was necessary for the fulfilment of the condition alleged was a license to take delivery from the enemy ship. That license was conferred by the Proclamation of 12th December 1914. The Proclamation is not retrospectively operative for the purpose of validating a contract rendered invalid by the war, but operates to permit performance, before it is too late, of the condition alleged. The consideration for the acceptance, therefore, did not fail.

As soon as the last-mentioned Proclamation was notified the plaintiffs were to use the terms of issue 4, in a position to make a valid tender of the documents relating to the goods. There must be a decree for the plaintiffs. The plaintiffs' suit was only filed, however, on 30th September 1915. We think that a fair order regarding interest on the amount of the bill of exchange sued on will be that it should only run from that date, though it must not be inferred from this that the plaintiffs would not, in our opinion, be entitled to succeed, but for the Proclamation of December. Subject to this variation, we affirm the decree and dismiss the appeal with costs.

G.P./R.K. *Appeal dismissed.*

6. (1857) 7 El & Bl 763=27 L J Q B 17.

7. (1915) Solicitor's Journal 25th December, 156.

A. I. R. 1916 Bombay 147

BATCHELOR, AG. C. J. AND SHAH, J.

Manilal Brijlal Shah—Appellant.

v.

Gordon Spinning and Manufacturing Co. Ltd.—Respondents.

First Appeal No. 178 of 1915, Decided on 7th September 1916, from decision of Dist. Judge, Ahmedabad,

(a) Companies Act (1913), S. 38, Proviso—Proviso is general reservation on all clauses of section.

The proviso to S. 38, Companies Act, 1913, should not be confined to the last clause, but must be read as a general reservation imposed on all the clauses of the section: 26 Cal 944, Ref. [P.149 C 2]

(b) Companies Act (1913), S. 38—Conditions precedent to appeal are lower Court

should direct question of law to be tried and should come to some decision thereon.

The conditions precedent to the existence of a right of appeal under S. 38 are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue. [P 148 C 1]

(c) Civil P. C. (1908), S. 100—Decision of issue tried on grounds mentioned in section—Appeal lies.

An appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in S. 100, Civil P. C. [P 149 C 1,2]

(d) Civil P. C. (1908), O. 21, R. 79—Purchaser of shares at Court sale is not of right entitled to have shares transferred to his name.

The purchaser of certain shares of a limited Company at a Court sale in execution of a decree against the share-holder is not entitled as of right to have the shares transferred by the company to his name. The position of a purchaser at a Court sale is neither better nor worse than that of a private purchaser: *Reg. v. East Indian Railway Company*, 1 I J (n. s.) 258, *Bourke O C* 395, *Dist.* [P 150 C 2]

Per *Batchelor, J.*—Whether the sale is made by a private individual or by a Court, it is clear that the thing sold and transferred from the seller to the buyer is merely the property in the shares plus a limited, not an absolute, right to have the transfer registered. The Court never has to sell the absolute right of forcing the Directors to register the purchaser's name. [P 148 C 2, P 149 C 1]

Per *Shah, J.*—It does not follow from the provisions of O. 21, R. 79, Civil P. C., that the Directors are compellable to accept the purchaser as the transferee, for otherwise the company would have the benefit of the shares to itself. [P 150 C 1]

G. N. Thakor—for Appellant.

Jardine and G. S. Rao—for Respds.

Batchelor, Ag. C. J.—This is an appeal from a decision of the learned District Judge of Ahmedabad upon an application made under S. 38, Companies Act (7 of 1913). The only facts which it is necessary to state are these. The five shares in controversy were originally owned by one Dosabhai. A decree against him was obtained by one Balmukund, and in execution of that decree these five shares were sold by the Court. They were purchased by the present applicant. As the judgment-debtor Dosabhai was unwilling to execute the transfer deed in favour of the applicant, the deed was executed by the Court. In these circumstances the applicant claims that he is entitled as of right to have his name placed on the register. The Directors have refused to register the transfer, and the learned District Judge has decided against the applicant, who consequently brings the present appeal. The

learned Advocate-General takes a preliminary point that under S. 38 of the Act the appeal is not competent. The objection is put in two ways. First, it is said that the proviso, which occurs at the end of the section, must be confined to the third clause of the section. Mr. Jardine admits that upon this point we have nothing to guide us but the framing of the section and the setting in which the proviso is placed. It appears to me that these circumstances constitute too slight and uncertain a ground for the inference which is sought, and I am of opinion, following the decision in *Amrita Lal Ghose v. Shrish Chunder Chowdhry* (1), that the proviso should not be confined to the last clause of the section, but must be read as a general reservation imposed on all the clauses.

Secondly, it was contended that the appeal does not lie because the conditions under which alone an appeal is granted under this section are not in this case satisfied. Now the conditions precedent to the existence of an appeal are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue. The Advocate-General contends that no such issue was in this case directed to be tried, and consequently, that there is no decision of the kind from which alone an appeal under the proviso is sanctioned. Speaking for myself, I think that there is great force in this argument, and I am very doubtful whether strictly, and as of right, this appeal is competent. I think that the appeal is certainly not rendered competent merely by reason of the circumstance that there occurs in the lower Court's judgment a passage in which the learned Judge sets out the nature of the question before him, and that it is possible to regard that question as a question of law. It is clear that in every application made to the Court there must be some question or other for the Court's decision and I cannot concede that when that question is capable of being regarded as a question of law, nothing more is needed for the admissibility of an appeal. On the contrary, I think that if an appeal is to be admitted, there must be a specific issue of law directed by the Court to be raised, and

directed with some advertence to the terms of this proviso. That has not been done in this case, and if the matter rested there, I should be inclined to say that the appeal did not lie. But it has been conceded before us that in the past the practice in these matters has been to this extent lax that wherever an appellate Court could seem to discern a question of law in the judgment of the lower Court, an appeal has always been allowed, even though no specific issue had been directed to the point. In this state of circumstances, rather than allow the present appellant to be prejudiced by the laxity of procedure in the past, I am prepared to admit the appeal and consider it on its merits.

Now on the merits the simple question involved is whether the appellant is entitled to claim that the Directors shall register his transfer, and is so entitled by reason of the fact that he is a purchaser at a Court-sale and not a private purchaser. For admittedly, if he were a private purchaser, he would not be entitled to throw any such obligation upon the Directors. It is urged that his position in this respect is substantially improved because he is a Court-purchaser. But after all the argument which we have heard from Mr. Thakor, I am unable to see in what respect his position is materially altered or improved by the circumstances that he purchased at a Court-sale. It may be that when the Directors refuse to approve a transfer after a Court-sale in execution, there may ensue inconveniences in practice. But similar inconveniences will also ensue when a private purchaser's transfer is refused to be accepted by the Directors acting within the limits of their discretion. For the purposes of this argument, we must, of course, assume that the Directors would be within their powers in refusing to register the present appellant if he were a private purchaser, and not a Court-purchaser. Upon that assumption, I can see no reason why the Directors' powers should be curtailed merely because the appellant purchased at a Court-sale. For whether the sale is made by a private individual or by a Court, it seems to me clear that the thing sold and transferred from the seller to the buyer is merely the property in the share plus a limited, not an ab-

1. (1899) 26 Cal 944.

solite, right to have the transfer registered. But the appellant here contends, and must contend, that when he purchased from the Court, he purchased, over and above the share, the absolute right of forcing the Directors to register his name. But that is a right which ex hypothesi the Court never had to sell. I infer that the appellant never bought it. This conclusion seems to me to be reinforced by the consideration to which the learned Judge has referred, the consideration, namely, that upon the case for the appellant nothing would be easier than to override that part of the memorandum of association which invests the Directors with a discretion to refuse to admit undesirable candidates. For if the appellant is right, then a person whose professed object might be to wreck or damage the company could nevertheless oust the Director's discretion, and compel them to register him, by the simple process of purchasing through the Court after a collusive decree. On these grounds, I am of opinion, that notwithstanding that the appellant's purchase was made through the Court, the directors' powers, under the memorandum of association, of refusing to accept the appellant as a share-holder, are unaffected. Upon this point the learned District Judge has held that the Directors were justified in their refusal, and all that is necessary now to say upon this part of the case is that on the facts found no question arises which could properly be urged under S. 100, Civil P. C. It is clear from those facts that the Directors would be justified in thinking, as they did think, that the appellant's object in obtruding himself upon this company was to impede and hamper and embarrass the business of the company, not to promote it. I think therefore that the appeal fails and should be dismissed with costs.

Shah, J.—I agree that the appeal should be dismissed with costs. The preliminary objection raised by the learned Advocate-General on behalf of the respondent that no appeal lies in this case is based on two grounds: first that the proviso to S. 38, Companies Act (7 of 1913), applies only to sub-S. (3) and not to the whole section generally; and, secondly, that the lower Court having omitted to direct an issue to be tried there can be no appeal. As to the first ground, I have no hesitation in coming

to the conclusion that the proviso applies to the section generally and not only to the last subsection. The corresponding proviso to S. 58, Companies Act, 1882, has been held to be applicable to the whole section in *Amrita Lal Ghose v. Shrish Chunder Chowdhry* (1); and it seems to me that the position of the proviso with reference to the subsections in the new Act is all the more favourable to this construction. Besides, I am unable to appreciate the significance of this contention in this particular case, as under sub-S. (3) the Court "generally may decide any question necessary or expedient to be decided for the rectification of the register." It is not possible to suggest that the question decided by the lower Court was not necessary for the rectification of the register.

The second ground is based upon the suggestion that in this case the Court has not directed any issue to be tried. It is apparently true that there is no such express direction. Having regard however to the procedure which is usually followed in an application under this section, it seems to me that though there was no express direction for the trial of the issue arising in this application, it was necessarily involved in the consideration of the application; and under the circumstances it is not unreasonable to hold that there was substantially a direction to try an issue raising the question set forth by the learned District Judge in his judgment, and that an appeal on the issue is competent. At the same time having regard to the fact that under the proviso as framed in the Companies Act of 1913 the appeal is allowed from the decision of an issue directed to be tried, it is necessary and desirable that there should be a clear direction as to the trial of an issue, so that there may be no obscurity on the point, and no room for the argument that there was no issue directed to be tried and consequently no right of appeal. At the same time it is clear from the terms of the proviso that an appeal can lie from the decision of an issue directed to be tried on the grounds mentioned in S. 100, Civil P. C.

The issue in this case raises two questions, one of law, and the other of fact. The question of law is whether the purchaser of certain shares of a limited company at a court-sale in execution of a de-

cree against the share-holder is entitled as of right to have the shares transferred by the company to his name. It is contended on behalf of the appellant that the company has no discretion in the matter and has no power to refuse to transfer the shares to the name of the auction-purchaser. It is common ground that a private purchaser from a share-holder must submit his application for transfer to the company and the application is liable to be dealt with by the Directors as provided by Arts. 22 and 23 of the articles of association of the company in question. But it is argued that the auction-purchaser in virtue of purchase at a court-sale has a much higher right in this respect than a private purchaser. On principle I am quite unable to see how the purchaser at a court-sale can have any higher right. He purchases the property subject to the same limitations to which the original owner could sell privately. The intervention of the Court, and the compulsory character of the sale, cannot prejudice the rights of the company and cannot alter the position of the purchaser in any way on this point. There is nothing in the provisions of the Companies Act and the Civil Procedure Code to support the argument that the company is deprived of its usual powers, and relieved of its corresponding obligations, to deal with a transfer application, when the transfer is sought in virtue of a court-sale. Mr. Thakor has relied upon R. 79, O. 21, Civil P. C. in support of his argument.

Under that rule, after the court-sale both the judgment-debtor and the company are prevented from transferring the shares and from receiving any dividend from, or paying it to, any person except the purchaser; and it is urged that if the company can be prevented from transferring the shares or paying the dividend to anybody except the purchaser, it must involve the result that the purchaser should be accepted as the transferee or else the company would be able to keep the benefit of the shares to itself. I do not think that the provisions of the rule involve any such result. Even though under the rule a company may be prevented from transferring the shares or paying the dividend to any person except the purchaser, it does not follow that the purchaser at a court-sale is in any worse position than a private pur-

chaser from a share-holder, whom the Directors have refused to accept as a proper transferee in the exercise of their powers under the articles of association. In considering this question we are not concerned with the inconveniences which would result to a particular individual from the Directors' exercising their discretion against him. It is enough for the purposes of this appeal to point out that in this respect the position of the purchaser at a court-sale is not worse than that of a private purchaser under the rule, and that it cannot be made any better in virtue of the rule.

Mr. Thakor has relied upon *Reg v. E. I. Ry. Company* (2) in support of his argument. But as I read that case the decision turns upon the facts and circumstances of that case: it cannot be properly accepted as an authority for the broad proposition of law for which Mr. Thakor contends in this appeal. I am therefore of opinion that the purchaser at a court-sale is not entitled as of right to have his name entered in the register of the company as a share-holder. He is subject to the same rules on this point as a private purchaser undoubtedly is. The second question raised in the issue is a question of fact, viz, whether on the facts stated the Directors have exercised their discretion properly in refusing to accept the present appellant as a transferee of the original share-holder. The learned District Judge has come to the conclusion that under the circumstances of this case the discretion of the Directors was "wisely" exercised. It is not necessary for me to express any opinion on this point; and I say nothing as to the merits or justice of the refusal by the Directors to transfer the shares to the present appellant. It is clear that the ground upon which the appeal is based is not covered by the grounds mentioned in S. 100, Civil P. C.

G.P./R.K. *Appeal dismissed.*

2. 1 Ind Jur (n s) 258=Bourke O C395.

A. I. R. 1916 Bombay 150

SCOTT, C. J. AND HEATON, J.

Amin Saheb and others—Plaintiffs—Appellants.

v.

Masleudin and others—Defendants—Respondents.

First Appeal No. 50 of 1915, Decided on 28th February 1916.

(a) **Bombay Court of Wards Act (1905), Ss. 31 and 32—Suit under S. 92, Civil P. C., against government ward is not bad for want of statutory notice or because guardian is not named from commencement of suit—Civil P. C. (1908), S. 92.**

A suit under S. 92, Civil P. C. 1908, properly instituted in relation to a public, charitable or religious trust against a Government ward is not one directly affecting, at all events, the property of the ward and therefore is not bad on the ground that the statutory notice provided for by S. 31, Bombay Court of Wards Act, has not been given, nor is it bad under S. 32 on the ground that the Court of Wards was not named as guardian from the commencement of the suit.

[P 152 C 2]

(b) **Civil P. C. (1908), S. 92—Omission to name guardian in suit against minor is mere irregularity in procedure.**

Where an omission to name the guardian of a ward in no way affects the merits of the case, it should be treated as a mere defect or irregularity in procedure : 25 Bom 574 and 30 All 55, *Ref.*

[P 152 C 2]

G. N. Thakor—for Appellants.

N. K. Mehta and *G. K. Parekh*—for Respondents.

Judgment.—The plaintiffs, who are the present appellants, instituted a suit under S. 92, Civil P. C., for the administration and management of certain religious wakf property. The learned District Judge after an investigation found certain of the trustees liable for certain sums. The 4th trustee was found liable only in respect of certain costs, but he was not found to be a defaulting trustee. In providing for the appointment of new trustees the learned District Judge has included defendant 4 as one of the trustees. That is substantially the ground of the plaintiffs' appeal to this Court, but it does not appear to us that there is any such blame attaching to defendant 4 upon the finding of the lower Court as should induce us to hold that he is not a fit and proper person to be a trustee under the new scheme. The appeal therefore must be dismissed.

That however is not the only question which we have to determine now, for it appears upon certain information brought to our notice by Mr. Mehta, who appears under instructions from the talukdari Settlement Officer as the Court of Wards in charge of the superintendence of the property of defendant 1 that that defendant has now, and since 1909, been a Government ward under the Court of Wards and was so at the date of the institution of this suit on 20th December 1910, and although there was a full hearing of charges against defendant 1

as a defaulting trustee in the Court of the District Judge, the Government Officer acting as the Court of Wards wishes to establish that by reason of defects in procedure provided by the Court of Wards Act (1 of 1905), the whole proceedings so far as defendant 1 is concerned are a nullity, including the decree for restoration of Rs. 6,000 found to be in his possession as a trustee liable to refund. The point has been brought to the notice of the Court in the form of cross-objections, as the Court of Wards was added as a party respondent by ex parte order. It has been contended on behalf of the appellants that the cross-objections are not properly stamped. We think that this contentious argument is well founded.

They must be stamped upon that footing as on an appeal relating to the sum of Rs. 6,000 decreed against defendant 1. We have no information as to the manner in which defendant 1 became a Government ward under the Court of Wards Act; whether he is a person declared by the District Court after application and inquiry to be incapable of managing, or unfitted to manage, his own property on account of physical or mental defect or infirmity, or such habits as cause, or are likely to cause, injury to his property or to the well-being of inferior holders under S. 5 of the Act; or whether he is a landholder who has applied in writing to the Governor in Council, under S. 9 of the Act, to have the property placed under the superintendence of the Court of Wards. In the absence of any evidence of a declaration by the District Court under S. 5, it would probably be safe to assume that he has made the application under S. 9. The point however is not very material. Defendant 1 was sued with the other trustees of a Mahomedan religious institution, and has been found to have been in possession of the trust funds for a long series of years. Being found to be responsible for a sum of upwards of Rs. 6,000 which has come to his hands, a decree has been passed against him. That decree was passed in a suit under S. 92, Civil P. C., properly instituted in relation to a public charitable or religious trust.

It is argued however on behalf of the Court of Wards that the suit is, within the meaning of S. 31, Court of Wards

Act, a suit "relating to the person or property of a Government ward," and therefore is one which cannot be brought in any civil Court until the expiration of two months after the statutory notice in writing prescribed by the section, which notice has not been given. Now this suit as instituted is merely a suit relating to the property of a religious institution, and not to the property of defendant 1 and the argument of the Court of Wards could only be sustainable, if it is permissible to regard the possible consequences of a suit in deciding the nature of the suit. The consequence of any suit against any defendant may be that there will be a decree against him, if not for money, at all events for costs, and as a consequence of such a decree, an application may be made for the arrest of the defendant in execution, and therefore it may in that manner affect his person. Similarly an application may be made to satisfy the decretal costs by issuing execution against his property, and in that manner any decree may affect his property. But the words of the section are not "affecting the person or property of the Government ward," but "relating to the person or property." Those words appear to us to bring within the scope of that section a designedly limited class of suits. It would have been easier for the legislature, if the contention of the Court of Wards was correct, to say "no suit shall be brought." That however is not the expression adopted. It must be not even any suit which may affect the person or property of the ward, but a suit relating to the person or property of the ward, and prima facie it must be a suit of which the nature is apparent as soon as the suit is framed, a suit to be judged by its intention and not by its possible consequences. It is easy to satisfy the words of the section without holding that they embrace any suit of any kind whatever. A suit relating to the person of a Government ward might be a suit, such as is referred to in *Sharifa v. Mune Khan* (1), for the custody of the person of the ward, or a suit relating to the marriage of the ward, or even a suit relating to the adoption of the ward. Similarly a suit relating to the property of the ward may reasonably be held to be a suit relating to property

1. (1901) 25 Bom 574.

which is really the property of the ward, and not the property of some other institution.

Not only is this suit however a suit relating to the property of an institution in which the ward is concerned only as a trustee, but the decree itself, when properly regarded, is a decree for restoration of the property of that institution to the persons responsible for its management under the new scheme. The defaulting trustee is assumed to have the property which was placed in his charge still in his possession. It is on that footing that he is held liable for it. It is not therefore a decree directly affecting at all events the property of the ward. For these reasons we think that the suit is not bad on the ground that the statutory notice provided for by S. 31 has not been given. Then it is argued that it is bad at all events under S. 32, which provides that subject to para. 2, S. 440, Civil P. C., which is not material for this judgment, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Ward's having the superintendence of the Government ward's property, shall be named as the next friend or guardian for the suit, as the case may be. But the section does not say that if the Court of Wards is not named as guardian from the commencement of a suit the suit is bad. If it is not in every case a fatal objection to a suit against a minor that a guardian has not been named as provided by Statute, then it is obvious that in certain circumstances the omission to name such a guardian during some part of the proceedings may be only a defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of the Court such as is contemplated by S. 152, Civil P. C. In that case there would be no reason to reverse or substantially vary the decree or remand the case.

In our judgment the omission in the present case in no way affects the merits of the case, and it is not suggested that the Court of Wards has any objection on the merits to the decree which has been passed. The conclusion that the omission, such as we have in this case, may be treated as a mere defect or irregularity in procedure is supported by a reference to the judgments in two cases

mentioned in argument, one *Rup Chand v. Dasodha* (2) and the other *Walian v. Banke Behari Pershad Singh* (3), a decision of the Privy Council. In both those cases the provisions of S. 443, Civil P.C., had not been complied with, as they should have been, but under the circumstances it was held that the non-compliance did not vitiate the proceedings. Every case therefore may be judged upon its own facts to see whether the omission has affected the merits or not. In the present case we think that the provisions of the section will be sufficiently complied with for the purposes of justice if notice is given to the Court of Wards that it will be added to the record as guardian ad litem of defendant 1 as from the date of this judgment, and the proceedings will be amended accordingly. Any further notices which have to be given will be given in the first instance to the Court of Wards as the guardian of defendant 1. We do not think that the plaintiffs should be punished in this case by an award against them of costs, and under the circumstances we will allow them their costs. Respondents 1 and 2 must pay their own costs, and respondent 1 must pay full court-fee on the ground that he is seeking to set aside the decree for Rs. 6,000.

G.P./R.K. Order accordingly.

2. (1908) 30 All 55.

3. (1903) 30 Cal 1021=30 I A 182 (P C).

A. I. R. 1916 Bombay 153

BATCHELOR, AG. C. J. AND SHAH, J.

Babu Ganesh Deshmukh and another—
Defendants—Appellants.

v.

*Sitaram Martand Deshmukh—*Plain-
tiff—Respondent.

Second Appeal No. 603 of 1915, Decided on 16th August 1916, from decision of Dist. Judge, Ahmednagar, in Appeal No. 163 of 1913.

Limitation Act (9 of 1908), S. 5—It is completely at the discretion of the Court to consider whether a case falls under "sufficient cause" of S. 5—In deciding such question Court should always give due weight to the disadvantages of the successful litigant and advantages of the careless party gained by the extension of time.

The question whether there is sufficient cause for the admission of an appeal beyond time under S. 5, Lim. Act, is primarily a question of discretion of the Court : 30 Bom 329, *Ref.*

[P 154 C 1]

In deciding this question, it is of capital importance that Courts should give due weight to

the consideration that to allow an extension of time is to deprive the successful litigant of the advantages which he has obtained, and that easy condonation of remissness and dilatoriness tends to their indefinite continuance. The rule of limitation should be enforced in all cases where it can be done without serious hardship and delay should not be excused where the parties have been negligent, remiss or careless. [P 154 C 1]

Where infants are concerned, they ought not, where they can be protected consistently with fairness to other people, to be prejudicially affected by the negligence or omission of their adult relations. But there is no such absolute immunity to infants that any degree of delay may be considered justifiable or excusable : *Curtis v. Sheffield* (1882) 21 Ch. D 1 and 8 MIA 160, *Ref.* [P 154 C 1,2]

A defendant in a suit died after the close of the arguments, but before delivery of the judgment, which went against him. His sons presented an appeal fifty days after the time allowed by law. One of the sons was a minor represented by his mother as guardian. It was proved that, during the progress of the suit, the defendant's adult son and his wife were aware of the proceedings and knew also the name of deceased's pleader. The appellants prayed that the delay might be excused :

Held : that, as the adult appellant and the minor's guardian were remiss and negligent, there was not "sufficient cause" for excusing the delay within the meaning of S. 5, Lim. Act.

[P 154 C 2]

Per Shah, J.—It is not suggested that, as a matter of course, the same time which would be allowed for the purposes of an application to bring the legal representatives of a deceased party on the record should be allowed to his minor representatives for preferring an appeal. But it would not be unfair to take that period as indicating a limit within which, if action is taken on behalf of the minor, the delay in preferring the appeal may be condoned under appropriate circumstances. [P 155 C 1,2]

Jayant G. Rele—for Appellants.

P. V. Kane—for Respondent.

Batchelor, Ag. C. J.—The appellants before us are Babu and Dattatraya, sons of the original defendant in the suit, Ganesh Vaman Deshmukh. Babu is of full age, but Dattatraya is an infant. Babu attained his majority on 3rd May 1913. On 22nd May of the same year, his father Ganesh died. On 3rd July 1913, the trial Court delivered judgment against the original defendant. The appeal in the District Court was filed on 2nd October, and is admittedly on the face of things about fifty days late. The question before us is, whether there are materials which would justify us in disturbing the District Judge's order refusing under S. 5, Lim. Act, to excuse the delay in the presentation of the appeal. S. 5 prescribes that an appeal may be admitted after the expiry of the prescribed period of limitation when the

appellant satisfies the Court that he had sufficient cause for not preferring the appeal within the period. The question whether sufficient cause is in the circumstances disclosed is primarily a question of discretion, and we have now to determine whether Mr. Rele for the appellants satisfies us that we should interfere with the District Judge's exercise of his discretion in this case. It is perfectly clear that there is no case for interference in regard to the adult defendant Babu Ganesh. But in regard to the infant, there is no doubt the important consideration that he ought not, if he can be protected consistently with fairness to other people, to be prejudicially affected by the negligence or omissions of his adult relatives. There is however another competing principle which must also be borne in mind, that is, the principle stated in *Karsondas Dharamsey v. Bai Gungabai* (1) where Sir Lawrence Jenkins points out that :

"When the time for appealing is once passed a very valuable right is secured to the successful litigant: and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained."

I am of opinion that it is of capital importance to give due weight to this consideration in Indian litigation, and though I do not suggest that the rule can yet be enforced in India as rigorously as it is enforced in England, I may call attention to the obvious fact that easy condonation of remissness and dilatoriness tends to their indefinite continuance. The way to get the rule respected is, I think, to enforce it in all cases where that can be done without serious hardship; for it seems to me that some finality and certainty of decision are of the highest consequence in India. In this context I may cite what was said by Jessel, M. R., in *Curtis v. Sheffield* (2), which was decided so long ago as 1882 :

"The next point, and as it seems to me the most serious point, is this, at what time are people entitled to rely upon the judgment of a competent Tribunal as to their rights and interests in property? Upon that question there has been a great change of opinion in modern times. In modern times it has been considered that there is nothing more important than that people's rights when ascertained by the judg-

ment of a competent Tribunal, if questioned, should be questioned within a very short period."

It seems to me probable that if in the past the rule had been applied here with less sympathy for the individual in default and more regard to the general interest of all litigants, India in 1916 would not be so far behind where England was in 1882. Now the learned District Judge has found that the adult appellant Babu and his mother Radhabai knew of the pendency of this suit, and knew, too the name of Ganesh's pleader. But though they had this knowledge from the date of Ganesh's death, they failed to put themselves in communication with the pleader, although it would have been an easy matter for them to do so. Babu, it appears, is an educated young man, and the widow Radhabai is described by the Judge as a lady well able to hold her own. As to the facts therefore there can be no doubt that Radhabai and the appellant Babu, who were concerned to prosecute this litigation in their own interests and in the interests of the infant, were negligent, remiss and careless, nor has real cause, far less a sufficient cause been given in excuse. That being so, it appears to me that we ought not to vary the District Judge's order, and that the minor ought not now to be able to disturb the respondent in the enjoyment of the fruits of this legal victory.

This decision is, I think, not at variance with anything said by the Privy Council in *Ranee Birjobutee v. Pertaub Singh* (3). If the facts of that case be studied, it will be seen that they were strong in the infant's favour, and even so their Lordships' decision reads rather as a reluctant concession to specially strong facts than as affording any countenance to the argument that, despite the absence of any excuse for delay, a successful litigant, after the decision in his favour has become ordinarily indefeasible, is again to be exposed to the harassment of an appeal merely because one of his adversaries happens to be an infant. Indeed their Lordships in express terms guard themselves from being understood to imply that where infants are concerned any degree of delay may be considered justifiable or excusable, and provision is made for the case of circumstances so strong as to prevent infancy from being an apology or an excuse. It

1. (1906) 30 Bom 329.

2. (1882) 21 Ch D 1=51 L J Ch 535.

3. (1859-61) 8 MIA 160=18 Moo. PC 465 (PO).

appears to me that this is such a case, and I do not think there is anything which would warrant us in differing from the learned Judge below, who has clearly approached the case with every sympathy for the widow and the orphan, but has found himself unable to assist them. The appeal therefore must be dismissed with costs.

Shah, J.—On the whole in this case I see no reason to hold that the discretion has been wrongly exercised by the lower appellate Court. On the facts I am satisfied that the appellant No. 1 Babu and his mother Radhabai had the necessary knowledge of the decision of the suit, and were negligent in not preferring the appeal in time. The only difficulty in the case arises on consequence of their being a minor brother of Babu, who has joined through his guardian Radhabai with Babu in presenting the appeal to the lower appellate Court. The original defendant died after the arguments in the suit were heard and before the judgment was pronounced, and the appellants who would be the legal representatives of the deceased defendant were not on the record, when the judgment was delivered. In the ordinary course, if a defendant dies during the pendency of the suit, and if the fact of his death is brought to the notice of the Court, the parties would have six months under the Limitation Act within which to make an application to bring the legal representatives on the record with a view to continue the proceedings.

In this case when the judgment was pronounced, the names of the present appellants were not on the record, and there was no legally appointed guardian whose duty it was to see that the appeal was preferred, if at all, in time. Under these circumstances it seems to me that every allowance ought to be made in favour of a minor heir whose interests apparently would be in the hands of his natural guardian, who had not on any previous occasion represented him in the suit. I do not for a moment suggest that, as a matter of course, the same time which would be allowed for the purposes of an application to bring the legal representatives on the record should be allowed to the minor for preferring an appeal. But it would not be unfair to take that period as indicating a limit within which if action is taken on behalf of the

minor, the delay in preferring the appeal may be condoned under appropriate circumstances. I am not prepared to say in this case that this consideration was not present to the mind of the learned District Judge. He has considered all the facts and circumstances connected with this point, and making all allowance in favour of the minor, he has come to the conclusion that the delay cannot be condoned; and I do not think that on the general considerations which I have indicated, I would be justified in dissenting from that conclusion. I therefore agree that the appeal should be dismissed with costs.

G.P./R.K.

Appeals dismissed.

A. I. R. 1916 Bombay 155

BACHELOR, AG. C. J. AND SHAH, J.

Vardaji Kasturji Marwadi—Appellant.

v.

Chandrappa Piraji Kshirsagar—Respondent.

Second Appeal No. 721 of 1915, Decided on 31st August 1916, from decision of Dist. Judge, Dharwar, in Appeal No. 191 of 1914.

Deed—Power of attorney—Where agent's authorization extends not to any class of business but is restricted to the doing of all necessary acts in the accomplishment of one particular purpose then the authorization is a "special power of attorney."

A power of attorney, after reciting that the principal gave the agent authority "to act in the following one matter," went on to provide:

"I have constituted and appointed the above-named person my true and lawful attorney in this matter to recover all moneys due to me in respect of the principal and interest of the aforesaid mortgage bond by suing on my behalf in a civil Court or by coming to an amicable settlement and to pass receipts for me, and on my behalf to sue and to receive process and to do all such acts in this one matter as I, if present, would have done or could have done or would have been permitted to do or would have been called upon to do":

Held: that it was a special power of attorney, inasmuch as the agent's authorization extended, not to any class of business or employment, but was restricted to the doing of all necessary acts in the accomplishment of one particular purpose, namely, the realization of one particular debt: 38 *Mad* 134; *Diss from; Charles Palmer v. Sorabji Jamshedji*, (1886) *P J* 63, *Ref.*

[P 156 C 2]

Distinction between general and special agency discussed. [P 156 C 2; P 157 C 1]

Coyaji and Nilkanth Atmaram—for Appellant.

G. S. Mulgaoker—for Respondent.

Batchelor, Ag. C. J.—The only question which arises for decision in this appeal is whether the power of attorney filed by the plaintiffs is a general power of attorney within the meaning of R. 3 of the rules made by this High Court under S. 122, Civil P. C., and published in the Bombay Government Gazette of 15th September 1910, at p. 1496. The rule in question is made in substitution of the provision occurring in Cl. (a), R. 2, O. 3, Civil P. C. That clause, as enacted by the Legislature, allowed the appearance as a recognized agent of a person holding a power of attorney authorizing him to make and do such appearances, applications or acts in any Court as are required or authorized to be made or done by a party. The direction by which this clause has been replaced owing to the rule made by the High Court is this: The recognized agents or parties by whom such appearances, applications and acts made or done are:

"Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties."

We have no concern with the question whether the grantor of the power was or was not a resident within the local limits of the original Courts' jurisdiction. That is a point which has not been considered. We must assume for the purposes of the argument that the grantor of the power was not resident within such local limits. Upon that footing all that we have to decide is whether the power is a general power of attorney within the meaning of the rule or as held by the learned Judge below, a special power. The operative words of the document are as follows: After reciting the transfer of a certain mortgage, the author proceeds:

"Accordingly, I have become owner of the said mortgage bond. Out of the principal and interest due to me in respect of the said mortgage bond, nothing has been paid to me. As the time in respect of it is about to expire, and it is necessary for me to go to my native place, I have constituted and appointed the above named person my true and lawful attorney in this matter to recover all moneys due to me in respect of the principal and interest of the aforesaid mortgage bond by suing on my behalf in a civil Court or by coming to an amicable settlement, and to pass receipts for me, and on my behalf to sue and to receive process, and to do all such acts in

this one matter as I, if present, would have done or would have been permitted to do or would have been called upon to do."

It appears to me clear upon the authorities that this power must be pronounced to be a special power of attorney, inasmuch as the agent's authorization extends, not to any class of business or employment, but is restricted to the doing of all necessary acts in the accomplishment of one particular purpose, namely, the realization of one particular debt. The authorities upon this point are conveniently collected in *Venkataramana Aiyar v. N. G. Narasinga Row* (1), a decision which was cited to the learned Judge below, and has been cited here in favour of the appellants. In regard to the actual decision, it is enough for me to say, with all respect, that I am unable to concur in it, as, in my view, the authorities set forth in the report justify rather the conclusion that the document then before the Court was a special power of attorney. The authorities referred to are extracts from recognized text-books bearing upon this question. In *Parsons on Contracts*, the special agent is defined as one authorized "to do one or two particular things," while a general agent is one authorized "to transact all his principal's business or his business of a particular kind;" and in *Story's work on Agency*, though the learned author employs a slightly different phraseology, it seems to me that the substantial distinction is identically the same. In *Lord Halsbury's Laws of England*, Vol. I, p. 152, the distinction is expressed as follows:

"A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession. A general agent is one who has authority, arising out of, and in the ordinary course of, his business or profession, to do some act or acts on behalf of his principal in relation thereto; or one who is authorized to act on behalf of the principal generally in transactions of a particular kind, or incidental to a particular business."

In *Leake* what I regard as the same distinction is expressed in these terms:

"Agents are distinguished in respect of authority as general and particular or special agents. The former expression includes brokers, factors, partners and all persons employed in a business or filling a position of a generally recognized character, the extent of authority being apparent from the nature of the employment or position; the latter denotes an agent appointed for a parti-

cular occasion or purpose, limited by the appointment."

The point is, I think, not one susceptible of much elaboration, and I must content myself with saying that the recognized text-book writers seem to me to concur entirely as to the line of distinction between a general and a special agency, and in my view, the distinction drawn by all of them leads to the conclusion that the particular document now before us is a special and not a general power. It seems to me perfectly immaterial that it authorizes the doing, not of one act, but of several acts, for the distinction is not between one act and several acts, but between an agency for a particular piece of business and an agency for all business or all business of a certain class. Here the agent is authorized to attend only to a particular business arising on a special occasion, and is not authorized to transact all his principal's business or even all his business of a legal character. This conclusion seems to me to receive support from this Court's decision in *Charles Palmer v. Sorabji Jamshedji* (2), where the original power of attorney conferred only authority to do all acts necessary for securing the execution of a particular decree. This Court decided that such a power was insufficient, and that the power required by law was a general power of attorney in the form prescribed at p. 186 of the then High Court Circulars. Now the form prescribed in that form was a form authorizing the agent to appear, sue or answer, and to receive all process, in any suit, appeal, or other judicial proceeding whatsoever in any Court. On these grounds I am of opinion that the learned District Judge was right in holding that the instrument now in suit was a special power of attorney, and his decree must, therefore, be confirmed, this appeal being dismissed with costs.

Shah, J.—I agree.

G.P./R.K.

Appeal dismissed.

2. (1886) P J 63.

A. I. R. 1916 Bombay 157

BATCHELOR, AG. C. J. AND SHAH, J.

Eustace Charles Palmer—Applicant

v.

Carmeline Mary Palmer — Opposite Party.

First Appeal No. 31 of 1916, Decided on 29th August 1916.

(a) **Divorce Act (4 of 1869), S. 14**—A decree of divorce will be refused when the husband delays in filing the complaint and where he himself is guilty of adultery.

A decree for divorce will be refused where there has been grave and unexplained delay on the part of the husband in making a complaint as regards his wife's abandonment of him and where he has been guilty of a persistent course of adultery after the occurrence of that event : *Schofield v. Schofield* (1915), P 207 and 84 L J P 186, Dist. [P 158 C 1]

(b) **Practice—Discretion Where the lower Court has used sound discretion appellate Court will not interfere with its decree.**

An appellate Court will not interfere with the exercise of its discretion by a lower Court where before exercising it in a particular manner, it has given full consideration to the facts and circumstances upon which that discretion was to be exercised. [P 157 C 2]

Patwardhan and D. C. Virkar—for Appellant.

Batchelor, Ag. C. J.—This is an appeal from a decision of the learned District Judge of Khandesh under the Indian Divorce Act (4 of 1869). The petitioner, who was the husband, prayed for a decree for a dissolution of the marriage on the ground of his wife's adultery with the second opponent, Augustus Gidley. It was not denied, and the learned Judge has found it proved, that the adultery alleged did in fact take place. But exercising the discretion confided to him under S. 13 of the Act, the learned Judge in view of all the circumstances, has come to the conclusion that he ought to refuse to grant a decree nisi. The question before us now is, whether we should interfere with that exercise of the learned Judge's discretion. In the first place there is this to be said that the discretion is primarily the District Judge's and not ours, nor are we, as I understand it, entitled to interfere merely because on a nice balance of the conflicting arguments, it might seem to us that, if the matter lay originally in our hands, our decision would be the other way. It is certain that before exercising his discretion in this particular manner, the learned Judge gave full consideration to the facts and circumstances upon which his discretion had to be exercised. Having regard to those facts and circumstances, it seems to me impossible to say that we should now be warranted in reversing his order. Mr. Patwardhan has said everything on behalf of his client, the husband, that could reasonably be said, and has called our attention to Sir Samuel Evans's decision in *Schofield v.*

Schofield (1). The facts in *Schofield's* case (1) do, no doubt, bear a certain superficial resemblance to those with which we are concerned, but the resemblance is only superficial. There the finding of fact was that the husband had committed only an isolated act of adultery which resulted in the birth of the child, and that act appears to have been committed after the wife had left the husband. Moreover, Sir Samuel Evans's own words supply the strongest caveat against accepting this decision as authoritative in any case where the facts are not precisely similar. For the learned President observed in his judgment: "It is a strange case: It is a case unlike any other which I have heard." Here, so far from all the circumstances pleading in excuse of the erring husband, we have it, first, that there was grave, and, in my opinion, unexplained delay before any complaint was made by the husband as regards his wife's abandonment of him; secondly, as the District Judge observes, it is patent on this record that both the husband and the wife have combined to withhold facts from the Court, and that by no means all the truth has been disclosed, and lastly, it is apparent that the husband has been guilty, not of an isolated act, but of a persistent course of adultery with the girl Dias. Speaking for myself, I have little hesitation in drawing the inference that the improper intimacy with the girl Dias began when Dias was a visitor at the appellant's house, while the appellant's wife was yet living with him. Upon these facts it seems to me impossible for us, as a Court of appeal, to say that the District Judge's discretion has been wrongly or improperly exercised adversely to the petitioner. The appeal therefore must be dismissed.

Shah, J.—I entirely agree.

G.P./R.K. *Appeal dismissed.*

1. (1915) P 207=84 L J P 186.

A. I. R. 1916 Bombay 158 (1)

BEAMAN AND HEATON, JJ.

Emperor

v.

John Francis Lobo—Accused.

Criminal Ref. No 38 of 1916, Decided on 4th September 1916.

Criminal P. C. (5 of 1898), Ss. 435, 437 and 438—District Magistrate has no authority to criticise the judicial decisions of Sessions Judge—He cannot make references to the

High Court questioning the correctness of the latter's decisions.

It is no part of the business of District Magistrates to criticise the judicial decisions of Sessions Judges, and Ss. 435, 437 and 438, Criminal P. C., do not authorize the former to make references to the High Court questioning the correctness of the latter's decisions: 23 Cal 250, Ref. [P 158 C 2]

A. G. Desai—for Accused.

S. S. Patkar—for the Crown.

D. R. Patwardhan—for Complainant.

Beaman, J.—In my opinion this reference is entirely without jurisdiction and of a kind that ought to be severely discouraged. It is no part of the business of District Magistrates to criticize the judicial decisions of Sessions Judges. The point has been considered in exactly similar circumstances in the Calcutta High Court: *Queen-Empress v. Karam-di* (1) and with the conclusion arrived at by those learned Judges I entirely concur. Quite apart from that, the case was first investigated, and very thoroughly investigated, by a Magistrate who discharged the accused. It was then again fully considered by the Sessions Judge in February 1916, who came to the same conclusion as the Magistrate. The concurrent finding is really a finding of fact, being merely as to the degree of care and prudence exercised by the accused. Four months later the District Magistrate makes this reference to the High Court.

In these circumstances, we do not think that this is a proper case for interference in the exercise of our revisional jurisdiction. We accordingly direct the record and proceedings to be returned.

Heaton, J.—I entirely agree. We are quite satisfied from a perusal of Ss. 435, 437 and 438, Criminal P. C., that that Code emphatically does not contemplate a reference of this kind. I only add that if we encourage references of this kind, it would open up an alarming vista of undesirable possibilities.

G.P./R.K. *Record returned.*

1. (1896) 23 Cal 250.

A. I. R. 1916 Bombay 158 (2)

BEAMAN AND HEATON, JJ.

Gulabchand Balaram Marwadi—Defendant—Appellant.

v.

Narayan Rama—Plaintiff—Respondent.

Second Appeal No. 196 of 1914, Decided on 28th August 1916.

Limitation Act (9 of 1908), Art. 97, Sch 1—In September 1908 D-1 contracts with plaintiff for money to procure from D-2 a reconveyance of property to plaintiff—In November 1908 D-2 conveys the property to a third person—In January 1902 plaintiff sues D-1 for the sum paid by him—The suit is time-barred—Time allowed being three years.

In September 1908, defendant 1 contracted with plaintiff, for a certain sum, to procure from defendant 2 a reconveyance of certain property to the plaintiff. Defendant 2 conveyed that property, in November 1908, to a third person. In January 1912, plaintiff sued defendant 1 to recover the sum paid by him:

Held: that, even assuming that the suit fell under Art. 97, Limitation Act, it was barred by time. [P 159 C 2]

V. D. Limaye and S. R. Gokhale—for Appellants.

B. V. Desai—for Respondent.

Judgment.—In our opinion the suit is clearly time-barred. Adopting the view of the lower Court, and that is admittedly the view most favourable to the plaintiff, that the suit is governed by Art. 97, we should still be as sure that it was time-barred. The admitted facts are that this agreement whatever its true nature may have been was entered into between the plaintiff and defendant 1 in September 1908. Adopting, again, the plaintiff's case, the agreement was of this nature. The plaintiff had paid the defendant the money which he now seeks to recover in consideration of the defendant procuring for the plaintiff a re-conveyance of certain property which had been sold under a Court decree in 1904. The nominal purchaser at that Court-sale was defendant 2, and the plaintiff's case is that defendant 1 was the real purchaser, defendant 2 being only his creature. That being the nature of the agreement, it is common ground that defendant 1 did not procure a conveyance to the plaintiff from defendant 2, but that in November 1908 defendant 2 conveyed the property to an outsider called Vithal Narhar. The defendant's case was that Vithal Narhar was merely a benamidar for the plaintiff. If that case were true, then the defendant would have fulfilled his obligation and the present claim would have no foundation whatever. That part of the defendant's case has been disbelieved by the Courts below and we accept their view. The position then is that defendant 1 having contracted with the plaintiff for a price to

procure from defendant 2 a re-conveyance of certain property to the plaintiff in September 1908, defendant 2 conveys that property in November 1908 to Vithal Narhar. These facts were all known to the plaintiff, who almost immediately prosecuted defendant 1 for cheating in respect of this transaction.

That complaint was started in December 1908. It is therefore quite clear that if the suit falls under any of those Articles upon which defendant 1, appellant here, relies, it must be time-barred. It is equally clear that it must be time-barred if the suit falls under the Article—and the only Article—upon which the plaintiff-respondent relies. The Courts below have viewed the continuance of the plaintiff's possession between September 1908 and 22nd July 1911, when Vithal Narhar took possession, as an existing consideration for the contract of September 1908. But, on the facts we have stated, this is clearly wrong. The moment there was a conveyance to Vithal Narhar whatever possession the plaintiff was allowed to retain, must have been on sufferance and by the grace of Vithal Narhar. Defendant 1 could have had nothing to do with it nor could that be regarded as consideration flowing from him, and the plaintiff must have been perfectly aware of that fact.

In whatever light, then, this transaction be regarded, we have no hesitation in saying that the conclusion arrived at by the lower appellate Court on the issue of limitation was wrong. The present suit is time-barred and must be dismissed with costs throughout.

G.P./R.K.

Suit dismissed.

A. I. R. 1916 Bombay 159

BEAMAN AND HEATON, JJ.

Ibrahim Bhura Jamnu—Plaintiff—Appellant.

v.

Isa Rasul Jamnu and another—Defendants—Respondents.

Second Appeal No. 542 of 1915, Decided on 4th August 1916, from decision of Joint Judge, Ahmedabad, in Appeal No. 190 of 1913.

(a) **Mahomedan Law — Dower** — There is nothing in Mahomedan Law to prevent the increase of the amount of dower by the husband.

There is nothing to prevent a Muhammadan husband increasing the amount of mehr (dower).

at any period after the marriage, beyond that which was originally in contemplation.

[P 161 C 1]

(b) Mahomedan Law—Dower Deed of sale in satisfaction of dower being in reality a deed of advancement does not require money consideration—Contract Act. S. 25.

In 1898, plaintiff's husband sold two houses to her for Rs. 1,700 in satisfaction of her dower, and himself continued to reside in one of the houses till his death in 1911. After his death the defendants, his son and another wife, took forcible possession of the house, and plaintiff's suit to recover possession of it was dismissed on the ground that the deed of sale was without consideration and that the suit was barred by time:

Held: (1) that the deed in question, being in reality a gift in consideration of marriage, was a deed of advancement and did not require any money consideration to support it; (2) that the husband's residence in the house from 1898 to 1911 was permissive and on behalf of the plaintiff, so that no question of adverse possession could arise.

[P 160 C 1]

G. N. Thakor—for Appellant.

T. R. Desai—for Respondents.

Beaman, J.—This is a troublesome case, because on a first view, it seems as though there are two concurrent findings of fact in the Courts below either of which would be fatal to the plaintiff's case. The first of these is that there was no consideration for the conveyance upon which the plaintiff relies, bearing date 26th February 1898. But in our opinion, having regard to the true character of the document and the relations subsisting between the parties thereto, it stood in no need of consideration, and the question thus raised and answered as a question of fact, bearing upon the operativeness of that document in both the Courts below, was a question which never should have been raised at all. The nominal vendor was the husband of the plaintiff and in form he sells two houses to his wife for what was then owing to her as her meher or dowry. The sum thus owing at the time is stated to be Rs. 1,700 (babashahi). A document of that kind is, on the face of it, a document of advancement and needs no consideration. It would have been as valid a document had there been no reference made to the amount of the meher. Had the vendor purported to sell these two houses to his wife for a nominal consideration of one anna, that would have been perfectly good consideration in the eye of law, and indeed had no consideration at all been expressed, the document would have been a perfectly valid transfer in consideration of marriage, for love and

affection. Its true nature then more clearly appearing to be what it really is, a deed of gift, a very little examination of the terms of the document would have shown to the Courts below that no question of money consideration ought to have arisen. And all documents of this kind being made in consideration of marriage, the consideration is not from the point of view of the donee, the money value expressed, but the marriage. Here what the vendor says in effect is:

"in consideration of our marriage I desire to give you the equivalent of Rs. 1,700 (babashahi) which I should have given you before and I give it to you in the form of two houses."

No one can suppose for a moment that the money was to pass first from the husband to his wife and then from the wife to the husband as in the case of an ordinary sale. Thus it appears to us that the whole inquiry into consideration instituted at the instance of the defendants in the Courts below was entirely irrelevant. And the course of that inquiry was seriously deflected by the wrong view of the document taken in both the Courts below. Thus the plaintiff, being put upon proof of consideration, she, a poor ignorant woman and suddenly confronted with a document of the year 1886, Ex. 70 in the case, imagined that she was bound to give some explanation of that before the Court would accept the later document of 1898. It is very natural, therefore, that she may have committed herself to statements under examination, which the trial Judge and the Court of First Appeal were right in disbelieving. But this does not in the least affect our view that primarily it was for the Courts to look at the true character and legal effect of the document itself and so in the first instance properly apportioning the burden of proof, if there was any burden, they should have next given effect to what was and what must have been at the time the intention of the parties to the document as expressed upon its face. It is to be borne in mind that this gift, as I choose to call it, is made by the husband in the year 1898 and that he survived it for 13 years. It was made by a registered conveyance which immediately transferred the ownership of the property to the plaintiff, his wife.

During the whole of that period it is not suggested that the donor or vendor made any attempt to revoke the document or have it set aside upon any ground of fraud, misrepresentation, failure of consideration or the like, and it is perfectly certain that he could never have done so, for the very good reason that it is a document which is in no need of consideration at all. It is idle, therefore to say, as was said in the Courts below, that it was open to the parties to show that the document was hollow and sham and that the vendor or donor never intended that it should be acted upon. It has all its legal effect from the moment of execution and there can therefore be no question of any intention to act upon or not to act upon it later. If this view be correct, and we feel no doubt whatever but that it is, it follows that the finding of fact in both the Courts below that the plaintiff-donee or vendee of the document of 1898 gave no consideration therefor is a finding of fact which is not binding upon us. What the Courts evidently meant was that all the meher she was entitled to had been given to her as far back as 1886, and this by the document, Ex. 70. In the first place, that is a consideration which does not properly arise in considering the effect of a complete document of advancement of the year 1898. In the next place, if it did arise, it should be plain, I think, that it carries no weight. For there is nothing whatever that I am aware of to prevent a Mahomedan husband increasing the amount of meher at any period after the marriage, beyond that which was originally in contemplation. And if it be said that meher owing by the husband to the wife once discharged is thereby finally extinguished, I may add that in that case the deed of 1898 shows itself more clearly in the light of a purely voluntary gift for love and affection. I do not say that on an ordinary construction of its terms that would be the view we should take of it.

It appears to us sufficiently clear and expressed in itself that the husband acknowledged that he was under some promise or obligation to pay his wife a sum of Rs. 1,700 (babashahi) in consideration of her marriage, and whatever effect is to be given to the earlier deed, showing that at one time he had entrusted her

with ornaments of the value of Rs. 1,000 also in consideration of marriage, that in itself does not appear to be in any way inconsistent with the later estimate made by the husband himself of what he at that period still considered himself to owe to his wife in consideration of marriage. That is what he and he alone should be cognizant of. He has recorded it in a registered instrument and it would be idle to attempt now to substitute the interpretation of Courts or the evidence of witnesses for an intention locked within the mind of an individual, who is now dead and not in a position to speak to it himself. Thus it is clear that, in his opinion, Rs. 1,700 (babashahi) being his indebtedness to his wife in respect of her marriage in 1898, he discharges it by the present of these two houses conveyed to her under a registered instrument. That, I should say, is the true construction of the document and sufficiently explains why we do not feel ourselves bound by the finding of fact in the Courts below on the point of consideration as it was presented and understood by those learned Judges.

Next, there is a point of adverse possession upon which again there are concurrent findings of fact against the appellant, that is to say, the learned Judges believed that the facts they found were conclusive against her present claim. Now if we look at the form of the plaint itself, we see at once that it is an extremely crude and inartificial document. What the plaintiff says is that she is the owner of this property and that she has been dispossessed of it somewhere in November 1911, shortly after her husband's death, by the defendants. In that form the suit appears to be a suit governed by Art. 142 of the Schedule to the Limitation Act, and in all cases of that kind the onus falls first upon the plaintiff alleging dispossession, and by implication therefore possession, to prove possession within the statutory period. But if we look to what was evidently the plaintiff's real meaning, taking the whole of her plaint in connexion with the document of 1898 annexed thereto, I think it is perfectly clear that every fact, found as a fact and rigorously separated from mixed inference, is entirely consistent with the plaintiff's allegations throughout. She has contended that under the deed of 1898 her husband sold to her, or

gave to her, as I prefer to say, both his residential houses Nos. 603 and 604 standing side by side, and that from that time onwards until 1911 she had the use and enjoyment of both of them. It is common ground that she has resided in house No. 604 and the finding of fact in both Courts—if indeed the Court of appeal directed its attention to this point, which I doubt—is that the plaintiff's husband Rasul resided in house No. 603 up to his death.

Now we think it would be no violent presumption upon that finding of fact, having regard to the relationship existing between Rasul and the plaintiff, to hold that such residence by Rasul was permissive by and on behalf of the plaintiff, and if that was so, then indeed she would prove her ownership by the deed of 1898 and thereafter constructive possession by the permissive residence of her husband Rasul in that house up to his death in 1911. Why are we to infer from the residence of a Mahomedan husband in one of the two houses owned by his wife with whom, as far as this evidence goes we must infer, he was on the most affectionate terms, that such residence was adverse to her right over the property? That that right existed is proved beyond all doubt by the execution of the conveyance. And nothing would be more consistent with normal relations in a Mahomedan household where the husband had two wives, as Rasul had, than that he should have occasionally availed himself of the other house for residence with his other wife with the permission of the plaintiff to whom he had given both houses in consideration of marriage. If then we take this view, while adopting every real finding of fact of the Courts below, we arrive, without any difficulty, at this conclusion upon the whole case. Whether the plaintiff was evicted forcibly as the Courts below have thought, she alleged, she was, seems to us a matter comparatively unimportant, and yet that is the only matter which appears to have engaged the attention of the appellate Judge who disposed of it in a line and a half. Upon all the evidence, we think that her case throughout was that she never had physical possession of house No. 603 at all in the sense I mean, that she never herself lived therein.

Upon this incident of violent dispos-

session both the lower Courts appear to have thought that she said that the defendants came to house No. 603 and turned her out of it. What she really said was something quite different. She said that she put her head out of the window of her own house No. 604 which is next door to the other house and remonstrated with them, but without any effect. Now that is entirely consistent with the view of the case as a whole which has commended itself to us, viz., from the execution of the instrument. Ex. 69, in this case until the death of Rasul the plaintiff's possession of house No. 603 was never more than constructive, although from that time until the death of Rasul there was no interposed adverse possession of any other person. Adopting that view and for the reasons which, speaking for myself, I have attempted to give in some detail we are of opinion that the materials before us are sufficient to enable us to dispose of this case without a further remand. Before concluding perhaps I may mention a preliminary objection taken by Mr. Desai on behalf of the defendant to the substitution of the present plaintiff, Ibrahim, for the original plaintiff Mariam. We went into that with some minuteness in order to be satisfied that Mariam's estate was fully represented by the present substituted plaintiff, Ibrahim, and we are satisfied that Ibrahim is the only surviving son of the late Mariam and that there are no others who are entitled to share in the representation of her estate. We therefore thought it unnecessary to direct further inquiry into this matter although the substitution was allowed *ex parte*. Our conclusion upon the whole matter is that the plaintiff's claim has been proved and should now be awarded with all costs throughout.

Heaton, J.—I agree. It seems to me that when you have a document executed and registered such as Ex. 69 in this case, there is no need to inquire, and it is irrelevant to inquire, about the consideration. It is a conveyance by a husband to his wife with whom he is living and expressed to be on account of dower. It is not a sale in the ordinary sense. But it is proved in the case that on a previous occasion the wife had received Rs 1,000 of dower or the equivalent and that this was the dower fixed as that

which was to be paid on the occasion of her marriage. But because this had been paid, what is there which invalidates the document in which the husband conveys the property to his wife for a different amount of dower? It is quite open to him to do so and having done so the conveyance is a good conveyance: it is in substance, however you look at it, a deed of gift. The only way in which such a document can be set aside is by proof of some such circumstances as are indicated in S. 53, T. P. Act. That indeed was the case set up by the defendants in this very suit. That attack admittedly fails. So I need say no more about it, and that attack having failed, I cannot see that there is any merit in what else has been urged against the deed. What has been urged seems to be inspired by some idea, to me rather curious, that after a man has duly executed a document and had it registered, he can get rid of it by showing that he did not intend it. This seems to me to be in law an entirely futile method of proceeding. Then as to the point of limitation, I am also in agreement with my learned colleague. Had the defendants any real case of adverse possession, they would, it seems to me, have put it forward in their pleadings or at any rate have raised it in the trial Court and have directed evidence to that point. But the case did not proceed on any issue of adverse possession. The defendants were content to deal with the question of limitation as a question involving only Art. 142, and, as my learned colleague has shown, and as I entirely agree, Art. 142 does not bar the plaintiff's claim. It seems to me that to allow the defendants now to substitute an attack on a ground of adverse possession—and this would involve a remand of the case—would be an indulgence to them which is not required either by law or by justice. So I concur in the order proposed.

G.P./R.K.

*Appeal allowed.***A. I. R. 1916 Bombay 163**

HEATON AND SHAH, JJ.

N. F. Markur—Applicant, In re.

Criminal Revn. Appln. No. 358 of 1914, Decided on 1st April 1914, against order of 1st Class Magt., Igatpuri.

Criminal Trial — Evidence — Criminal breach of trust with reference to certain items — Civil liability determined by civil

Court—Judgment of civil Court is relevant — Complaint should not be proceeded with during pendency of appeal in civil case.

Where the accused is charged with criminal breach of trust with reference to certain items and the question of civil liability with respect to those items has been determined by a competent Court, the judgment of that Court would be the best evidence of the civil rights of the parties, and hence a relevant fact and admissible in evidence. [P 163 C 2]

The complaint under the circumstances ought not to be proceeded with during the pendency of the civil proceedings by way of appeal. [P 164 C 1]

Inverarity and R. R. Desai—for Applicant.

S. S. Patkar—for the Crown.

K. N. Koyaji—for Complainants.

Shah, J.—The learned Magistrate has based his order on the ground that the judgment of the civil Court is irrelevant. It also appears from his order that he was under the impression that the decision of the civil Court was in favour of the accused only partially, that is, with respect to certain items only. But it is admitted before us that all the items in dispute between the parties have been dealt with by the civil Court and that the contentions of the accused with reference to all of them have been found to be correct. Under the circumstances it appears to me that the judgment of the civil Court is admissible in evidence. The accused is charged with criminal breach of trust with reference to certain items. It would be certainly relevant and important to know what the rights of the parties (that is, the complainant and the accused) are with respect to those items. Where the civil liability is determined by a competent Court, the judgment of that Court would be the best evidence of the civil rights of the parties, and, in my opinion, it is relevant and ought to have been admitted in evidence. In this case the existence of the judgment in question is clearly a relevant fact.

—It is next urged that the accused should be discharged on the strength of this judgment. It is not a matter however which we can properly deal with on this application. It will be for the Magistrate to consider the effect of the judgment on the case, and to deal with the accused's application to discharge him. We are informed however that the complainant has preferred an appeal to this Court against the decree of the First Class Subordinate Judge of Nasik;

and it is suggested on behalf of the prosecution that the further proceedings on the pending complaint be stayed during the pendency of the civil appeal. The learned Counsel for the accused accepts this suggestion. Under the circumstances it is quite clear that the complaint ought not to be proceeded with during the pendency of the civil proceedings by way of appeal. I therefore, set aside the order of the lower Court, and direct that the proceedings be stayed during the pendency of the appeal filed by the complainant.

Heaton, J.—I concur in the order proposed. I would just like to add a word or two on the very important matter of the admissibility of the judgment of the civil Court. I hold undoubtedly that it was admissible, and for this reason: If we are to administer justice as a civilized country, if we are to avoid those conflicts between civil and criminal Courts which ordinarily must be fraught with evil and can produce no good, if, in short, we are to make the actual administration of justice in this country bear a proper relation to that which we profess it to be, then we cannot have criminal Court trying over again matters which have been thoroughly dealt with and finally decided by a civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on, possibly, the discovery of new, cogent and important evidence. But ordinarily that principle must prevail, and if that principle must prevail, then it is a matter of the first importance, of the very highest relevancy, to show to a criminal Court that the matter which the criminal Court is asked to adjudicate on has already been fully dealt with by a civil Court. That is all it was proposed to do in this case by the production of the judgment of the civil Court, and, I think, it was undoubtedly relevant and of the every highest importance. It was so however not for the purpose of proving or disproving facts in dispute in the case but for the purpose of enabling the Magistrate to decide whether he should or should not exercise the discretion given him by Cl. (2), S. 253, Criminal P. C.

G.P./R.K.

*Order set aside.***A. I. R. 1916 Bombay 164**

SCOTT, C. J. AND HEATON, J.

Bombay and Africa Steam Navigation Co., Ltd.—Defendants—Appellants.

v.

Ajum Goolam Hoosein and others—Plaintiffs—Respondents.

Original Civil Jurisdiction Appeal No. 54 of 1915, Decided on 26th January 1916, from decree of Beaman, J.

Contract—Construction—Apart from special condition in charter party shipowner is entitled to charterer for damages to cargo occasioned by bad stowage or improper and insufficient dunnage—Conflict between terms of charter party and bill of lading—Former prevails.

Under the general law, and apart from special conditions in a charter party, the shipowner is liable to the charterer for the damage to cargo occasioned by bad stowage or improper and insufficient dunnage, and this prima facie liability is not modified by the nomination of the stevedores by the charter or by a clause in the charter party that stevedores are to be employed at current market rates not exceeding the owner's contract rate. [P 165 C 1]

Where a charter party contains the above provision, stevedores chosen by the charterers are to be the agents and paid servants of the shipowner in loading the cargo: *Harris v. Best-Riley & Co.*, (1892) 68 L. T. 76, Ref. [P 165 C 1]

Where there is a difference or conflict between the terms of the charter party and the bill of lading, the former prevails. [P 165 C 2]

Where the charter party provides that the charterer shall be entitled to all sweepings and shortage occasioned by escape from the bags at the port of discharge, effect must be given to it, and the shipowner cannot seek protection in a condition in the bill of lading which renders the ship immune against loss or damage caused by insufficient packing and torn, weak or fragile bags and say in defence that the shortage was caused by the charterer's negligence. [P 165 C 2]

Where, under the terms of a charter party, all the sweepings are to be delivered to the charterer, the shipowner cannot apportion them between the charterer and other shippers to whom the former had let out cargo space in proportion of the quantity owned by each of them. Their contract is with the charterer who is entitled to all the sweepings. [P 165 C 2]

Jinnah and Davar—for Appellants.*Kanga and Mocs*—for Respondents.

Scott, C. J.—This is an appeal from the judgment of Beaman, J., in a suit in which the plaintiffs are the charterers and the defendants are the owners of the steamer Abydos, which was chartered to carry a cargo of rice from Burma to Bombay. In the main there are two questions which have to be decided. The first is the question of dunnage and the alleged damage caused by insufficient or improper laying of dunnage, and the other is the question of shortage and

sweepings. Dealing, first, with the question of dunnage, the charter party provides :

"nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or certain other specific causes,"

and at the end of the charter party it is expressly provided that the charterers' stevedores at the loading port are to be employed at current market rates but not exceeding the owners' contract rate, and all mats and requisite dunnage to be provided by the steamer. The question is, in the first place, as a matter of law, who is to be responsible for improper or insufficient dunnage for the protection of the cargo upon the voyage. Apart from the concluding clauses of the charter party to which I have just referred, there can be little doubt that the shipowners would be liable to pay for the damage to cargo occasioned by bad stowage or improper or insufficient dunnage, and the question is whether their prima facie liability has been modified by the clause as to the charterers' stevedores at the loading port who are to be employed at rates not exceeding the owners' contract rate. The learned Judge upon the authority of *Harris v. Best-Ryley & Co.* (1) has come to the conclusion that upon the terms of the charter party stevedores chosen by the charterers were to be the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo, and in this conclusion we agree.

The question of fact remains whether the damage was or was not caused by improper laying of dunnage as found by the learned Judge. Now upon that question there is a conflicting evidence of two marine surveyors, and we also have the evidence of the Parsi purser of the ship who only speaks as to the cargo stowed under his personal supervision. The learned Judge has come to the conclusion that damage to a certain specified extent was caused by the improper laying of the dunnage at the port of loading, and after considering the evidence and the arguments of the learned counsel for the appellants, we have come to the conclusion that the learned Judge is right. Therefore, with regard to the dunnage

1. (1892) L T 76.

the appeal fails. The remaining question regarding shortage and sweepings is not so simple. The facts are that rice was shipped at the port of loading not only by the charterers, but by other shippers to whom the charterers in pursuance of the terms of the charter party to that effect leased out a portion of the cargo space. The rice shipped was mostly Nakranji rice shipped *F. O. B.* at the rate of Rs. 7-15-6 per bag, while a certain portion of the rice shipped was Larool rice shipped *F. O. B.* at the rate of Rs. 6-15-0 per bag. The bags of rice shipped by the charterers, as the bills of lading state, were in apparently good order and condition and were to be delivered, subject to the exceptions and conditions specified, in the like good order and condition from the ship's tackles, showed upon discharge at the port of destination a shortage amounting to between 383 cwts. and 400 cwts. The sweepings of rice lying loose in the ship after discharge amounted to about 575 cwts., and it is therefore obvious that a certain portion of the sweepings cannot have escaped from the bags shipped by the charterers and must be attributable to other bags shipped by persons to whom the charterers had let cargo space. The bills of lading contain two provisions which are material.

The first is the general exception which includes, among other conditions, insufficiency of wrappers and package and all injury to the same and all damage arising from other goods by stowage. There is also a special condition that the ship is not responsible for loss or damage caused by insufficient packing, torn, mended, charfed, weak or fragile bags and bagging wrappers nor for usual and reasonable wear and tear of packages. If therefore the bills of lading were the only test of the liability of the shipowners, it can hardly be doubted that on proved facts the shipowners would not be liable to any shippers in respect of shortage occasioned by an escape from the bags. But the prevailing contract, where there is a conflict of provisions as between the shipowner and the charterer, is, it is conceded by counsel for the appellants, the charter party. The charter party has two provisions which are relevant to the question. It provides that the steamer is to be responsible for any proved shortage. We take the proved

shortage to be 383 to 400 cwts., and apparently at the trial it was stated that it might be taken to be 400 cwts. The charter party also provides that all sweepings are to be delivered to the charterers at the port of discharge and therefore although the shipowners might, as against the shippers who could only rely on the bills of lading, appeal to exception 28 to absolve themselves from liability for shortage, they could not successfully plead it as against the charterers in respect of the goods shipped by them, for by the charter party they are to be responsible for any proved shortage.

It is contended that if both the provisions of the charter party are applied in favour of the charterers as was done in the lower Court, the result is that charterers in effect are paid twice over. First of all, they get the value of all the sweepings in the steamer, and, secondly, they get the value of the goods found short. The argument was that the shipowners ought to be allowed to collect the sweepings and when it is found that certain bags do not contain the quantity shipped, they should be allowed to allocate to the bags which contain a short quantity a proportionate part of the sweepings collected and in this way justice would be done. Manifestly however such a procedure would give rise to great difficulties in any case where sweepings were not of one quality of rice and where they were not, as in almost every case they could not be, uncontaminated or undeteriorated by lying on the deck during the voyage. Therefore, a rough and ready arrangement appears to have been made in the charter party that all sweepings are to be delivered to the charterers at the port of discharge. That is the agreement and if the argument on behalf of the appellants were correct, the shipowners would be allowed to say :

"We will not deliver all the sweepings as we have agreed to deliver them but we will only deliver a proportionate part of the sweepings, namely, 400 cwts., and the other sweepings we will appropriate for compensation to the other shipowners, and we will not be responsible to you as we have agreed in the charter party for any proved shortage because we will have made up the shortage by sweepings."

The answer is that that is not the contract. It appears to us for that reason that the learned Judge is right and that the judgment of the Court below must

be affirmed and the appeal dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 166

BATCHELOR, AG. C. J. AND SHAH, J.

Raoji Fakira and others—Defendants
—Appellants.

v.

Dagdu Hanmata Mahar and others —
Plaintiffs—Respondents.

Civil Appeal No. 46 of 1915, Decided on 24th August 1916, from order of First Class Sub-Judge, Nasik, in Appeal No. 297 of 1913.

(a) **Jurisdiction — Civil Court — If to be withdrawn must be withdrawn by unambiguous words.**

The jurisdiction of civil Courts, if it is to be withdrawn, must be withdrawn by clear words and not by doubtful inferences: 8 *Bom* 25, *Ref.*

[P 167 C 1]

(b) **Bombay Hereditary Offices Act (Bom. 3 of 1876), S. 64 (a)—Empowers a Collector to register the names of individual vatan-dars but does not empower him to determine who are vatandars**

Section 64 (a), Hereditary Offices Act, merely empowers a Collector to register the names of individual vatandars as holders of the office, and does not confer a power to determine who are vatandars.

[P 167 C 1]

It is competent to a civil Court to grant a declaration that plaintiffs are vatandars of a mharki vatan.

[P 167 C 1]

W. B. Pradhan—for Appellants.

D. C. Virkar—for Respondents.

Judgment. — The only question involved in this appeal is whether the lower appellate Court was right in its view that it is competent to the civil Court to grant a declaration that the plaintiffs are vatandars of a mharki vatan. In our opinion the lower appellate Court was right. It is conceded that, as numerous decided cases show, no objection could be offered to the civil Court's making such a declaration in the case of plaintiffs claiming to be vatandars of a kulkarniki or a patilki vatan. But it is urged on behalf of the present appellants that the same rule does not hold in regard to the mharki vatan, and the reason is that the kulkarniki and the patilki vatans are regulated by Ss. 25 and 36, Hereditary Offices Act, which sections, occurring in Part 6 of the Act do not apply to the case of a mharki vatan. This kind of vatan, proceeds the arguments, is governed by Ss. 63 and 64 which constitute Part 10 of the Act; and by S. 64 it is provided that the power of deciding who are the

vatandars of these inferior village vatans is vested in the Collector. But the only support which can be discovered for this contention is to be found in Cl. (a), S. 64, and that clause goes no further than to say that, subject to the general control of Government, the Collector is empowered to register the names of individual vatandars as holders of the office. But the distinction between the power to register the vatandars and the power to determine who are the vatandars to be registered seems obvious, and S. 64 says nothing on the point as to where the power to determine the vatandars is to reside. That being so, there is no reason to think that this power is withdrawn from the jurisdiction of the civil Court. For that jurisdiction, if it is to be withdrawn, must be withdrawn by clear words, and not by doubtful inferences. This conclusion is confirmed by West, J.'s decision in *Ramchandra Dabholkar v. Anant Sat Shenvi* (1).

It is true that, as an accidental circumstance, the vatan there under consideration happened to be a gavki or patilki vatan. That accident however had no influence upon the decision, which proceeds generally to consider the case of all vatans, and the learned Judge observes that the discretion of the Collector comes into play only after those who are to be its subjects have been determined. That case was decided in 1883, and has ever since been consistently followed. It seems to us not a probable supposition that West, J., and all succeeding Judges have overlooked the provisions of S. 64 of the Act. On these grounds we think that the lower appellate Court's decision is right and this appeal is dismissed with costs.

G.P./R.K. *Appeal dismissed.*

1. (1881) 8 Bom 25.

A. I. R. 1916 Bombay 167

BEAMAN, J.

Carolina Dos Santos—Plaintiff.

v.

Dominic Joseph Pinto—Defendant.

Original Civil No. 994 of 1915, Decided on 3rd July 1916.

(a) Succession Act (10 of 1865). S. 10—**Essence of Domicile of choice is that the residence should be intended to be permanent.**

Under S. 10, Succession Act, it is of the essence of the acquisition of a new domicile or a domicile of choice that the residence should be in-

tended to be permanent, that is to say, a man making the choice should mean it to be final and definitely intend quatenus in illo exuere patriam, to end his life in the residence which he has thus chosen, in a new place or country. [P 172 C 1]

(b) Succession Act (1865), Ss. 7 to 13—**Domicile of origin is that where a person is born and follows the domicile of the parents—By the abandonment of domicile of choice, Domicile of origin revives—But for such abandonment it should be in fact and also in intention that it is to be final—If it falls short of one of these factors Domicile of choice, persists and Devolution of estate would be according to the Law of the Domicile of choice.**

The domicile of origin is that which a person acquires at his birth from his parents and follows the domicile of the parents. It is not necessarily in itself local, that is to say, merely the place of birth. The domicile of origin once ascertained in law clings and adheres to the person, until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin. The domicile of choice is acquired by a combination of fact with intention. The fact is residence, and the intention is that the residence should be permanent. The domicile of choice can be discarded as easily as it can be acquired by a fact and an intention, namely, the fact of abandoning the residence, accompanied by the intention that that abandonment shall be final, and upon the abandonment of one domicile of choice without the acquisition of another, the domicile of origin revives proprio vigore and without the need of any further act or intention on the part of the person. Just as a domicile of choice is easy to acquire, so it is as easy to abandon. But for its abandonment two things are necessary, the abandonment in fact and the intention that that abandonment shall be final and permanent. If with that intention clear in his mind, a man should fail actually to abandon his domicile of choice and die before thus far giving effect to his intention, the result would be that the domicile of choice would persist and the distribution of his estate would have to be governed by it [P 169 C 2; P 170 C 2]

It is not necessary for the abandonment that the person abandoning should effectually resume his domicile of origin, that is, should physically reappear at the domicile of origin before he could divest himself of the domicile of choice. The moment he quits the domicile of choice, the domicile of origin revives proprio vigore, even though he dies on the journey [P 171 C 1, 2]

Duration of residence has nothing to do with the complete acquisition of a domicile of choice. In the absence of express declaration it is hardly possible to infer from a mere residence for an indefinite period but for a definite purpose an intention permanently to abandon the domicile of origin. [P 171 C 1]

It is not possible to enumerate the indicia of an intention to make a residence a permanent home, nor can there be any question of the degree of clearness with which such an intention must be made out. It cannot be proved more or less clearly. In every case it is a pure question of fact which must be answered upon the evidence laid before the Court. And there can be no better evidence than the man's statement of intention, if it can be proved. [P 174 C 1]

The onus is upon the person alleging that a man has acquired a domicile of choice to prove that he had that intention. [P 174 C 1]

In the absence of intention either way, the long duration of residence in a foreign country terminated by death may be a good ground for inferring that, synchronously with the commencement of that residence, there had been an intention of making the residence permanent. Inferences of that kind may be rebutted by facts which would explain the duration of residence compatibly with an intention to return to the domicile of origin and the law leans very strongly in favour of the retention of the domicile of origin. Where there are no declarations of intention either way, Courts would be slow to infer from the mere fact of residence, however protracted it may be, the intention requisite to complete the substitution of the domicile of choice for that of origin. [P 174 C 2; P 175 C 1]

Plaintiff's husband, a Goanese, who was born in Goa, settled in Bombay in his fourteenth year for purposes of trade and conducted a flourishing business there till his death in his seventy-second year. During this period he visited Goa only four or five times, though he intended to retire and spend his closing years there. He made a will in Bombay whereby he bequeathed Rs. 7 a month to plaintiff for her life. In a suit by plaintiff for a moiety of the estate under Portuguese Law :

Held : that plaintiff's husband had, despite his intention to return to Goa, acquired a domicile of choice in Bombay and that the devolution of his estate was therefore governed by the provisions of the Indian Succession Act : *Bruce v. Bruce*, (1790) 2 Bos. Pul. 229n ; *Huntly (Marchioness) v. Gaskell*, (1906) AC 56 ; 52 Cal 631 ; *Cockrell v. Cockrell*, (1856) 25 LJ Ch 730, *In the Goods of Raffenet* (1863), 32 LJ P C 203 ; *In re Steer*, (1853) 3 H & N 591 and *Winans v. Attorney General*, (1904) AC 287, *Ref.*

[P 177 C 1]

Vacha and Mulla—for Plaintiff.

Bahadurji, Strangman, M. J. Mehta and Wadia—for Defendants.

Judgment.—The plaintiff sues the defendants as heirs and representatives of the deceased Pascoal Pinto, on the ground that at the date of her marriage with the said Pascoal Pinto he was a domiciled subject of Goa in Portuguese India and that, being so, their marriage with all its legal incidents must be governed and determined by the law of Portugal. This being done, she alleges that certain rights will then be adjudged due to her, and seeks to recover accordingly. Defendant 3, one of her stepsons, supports her case in the main and contends on his own behalf, that at the date of the marriage of his mother with the deceased Pascoal Pinto, Pascoal Pinto was a domiciled subject of Goa in Portuguese India and that in like manner with the plaintiff he, defendant 3, was entitled to certain rights and benefits

under the Portuguese law. The defence is that Pascoal Pinto was, at the time of his two marriages, with the mother of defendant 3 in 1871 and with the plaintiff in 1903, a domiciled subject of British India and that in consequence none of the rights or reliefs claimed by the plaintiff or defendant 3 can be awarded. In this state of the pleadings it was agreed that the question, whether Pascoal Pinto was at the dates of his marriages subject to the law of Portugal, or, being a domiciled British Indian subject, subject to that of British India, was first to be inquired into and decided.

Although I understand that defendant 1, upon whom the burden of the defence has rested, does not admit that the domicile of origin of his father Pascoal Pinto was Portuguese, he has nevertheless accepted the onus of proving that Pascoal Pinto acquired as his domicile of choice a British Indian domicile before and at the dates of his two marriages. And upon this question of fact a considerable amount of evidence has been laid before the Court on both sides. With the energetic assistance of the learned counsel for defendant 1 and plaintiff, I have made the trial of this question an occasion for studying with some minuteness the course of the law of domicile in the Courts of England from the case of *Bruce v. Bruce* (1) to that of *Huntly (Marchioness) v. Gaskell* (2). The dicta of the most eminent writers and commentators on this branch of the law of nations have also been fully considered. The result of any such comprehensive survey is, in the first place, to leave an impression upon the mind that the law of domicile is extremely complex, recondite and in need of elaborate and constantly over-elaborated definition. It is hardly too much to say that a study of the leading cases on this subject reveals too often what appears to me much confusion of thought and almost always that great superfluity of verbiage which is the curse of case-law. There can however be little doubt that the attitude of the Courts in England towards the underlying principle of the law of domicile has undergone some slight change during the century under review. Not so much a change perhaps as to what really is required to consti-

1. (1790) 2 Bos & Pul 229n=126 E R 1251.

2. (1906) A C 56=75 L J P C 1.

tute a change of domicile as with regard to the determining criteria for deciding whether those requisites have or have not been complied with in any given case.

Leaving out of consideration any anomalies and complications which may properly be referable to the views held by the Courts at one time regarding the peculiar character of the East India Company and the legal consequences of accepting service under it, it still seems to me to be clear that in cases such as those of *Bruce v. Bruce* (1) and many which followed it learned Judges thought that it was quite sufficient to have evidence that a person had taken up a habitation in a country other than that of his country of origin with the intention of remaining in that new country for an indefinite period to constitute this latter country his domicile of choice. Yet a very little examination of the law of domicile from its origin in the civil law and through all the process of its moulding and exposition by the English Courts should show, I think, that it rests upon extremely clear and simple fundamental principles. And if those principles had been invariably adhered to without one Judge after another and one eminent jurist after another endeavouring to improve upon them by definition after definition, I cannot myself understand how it ever could have been thought and indeed so frequently said in the highest tribunals in England that the topic of domicile regarded merely as a topic of law was one of great legal difficulty. It is only because of this unwearying desire to add in every case by some new definition, precision and clarity to what in itself has always seemed to me quite clear and precise, and in such processes, often confusing, not only that which is needed to understand the principle, but what are supposed to be useful rules of guidance in applying that principle to any set of given facts which happen to be interesting to the trying Courts, that the subject has now acquired its surface air of complexity and difficulty.

Let us go to the beginning and see what is contained in and for that matter exhaust the legal notion of domicile. The domicile of origin is that which a person acquires at his birth from his parents and follows the domicile of the

parents. It is not necessarily in itself local, that is to say, merely the place of birth; but it is seldom indeed that the determination of the origin of domicile has given rise to practical difficulty. In all the long array of cases I have studied during this trial, I think, it is only in a recent Calcutta case, *Bonnand v. Emile Charriot* (3), decided by a single Judge, that the question of domicile of origin was of primary importance. The domicile of origin once ascertained in law clings and adheres, to use favourite judicial terms to the person until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin. The domicile of choice is acquired by a combination of fact with intention. The fact is residence, and the intention is that the residence should be permanent. If we bear in mind that the domicile of choice can be discarded as easily as it can be acquired by a fact and an intention, namely, the fact of abandoning the residence accompanied by the intention that that abandonment shall be final, and that upon any such mere abandonment of one domicile of choice without the acquisition of another, the domicile of origin revives *proprio vigore* and without the need of any further act or intention on the part of the person, we shall have fully exhausted all the legal contents of this much vexed and much discussed legal notion. The multiplication of terms in the innumerable definitions to be found in the writings of jurists and the judgments of Judges, to which I have already referred as usually happens in such cases only results in further clouding rather than clearing up the notion being analysed, for it is clear as a matter of logic that the more terms are given to definitions the more doors are opened to further dialectic disputes; and the best definition is that which contains the fewest terms provided they are sufficient and decisive.

It is only upon one term virtually in the whole of this legal notion of domicile that any ambiguity can arise and no doubt the ingenuity of lawyers has made the utmost of it; and that term, of course, applies to the character of a domicile of choice and is to be given to the intention which along with the fact of residence completes the domicile of

choice in the eye of the law; that is to say the intention must be to make the domicile of choice in fact a residence and in intention a permanent residence. The difficulty to be found in some of the cases lies in the substitution, at one point or another in the legal history of this doctrine, of indefinite duration for permanence. It was then held sufficient to make out a good domicile of choice to prove that a man had taken up his residence in a country other than that of his domicile of origin for an indefinite period, say, for such a period as would enable him to make his fortune. If A being English by origin goes to France saying: "I intend to remain there till I have made my fortune and then return to England," it is clear as a matter of plain logic that no Court ought to hold that he had abandoned his domicile of origin and substituted for it a domicile of choice; because while it is true that he might never make his fortune in France and therefore might remain there till he died, yet it is as true that he might make his fortune in six months and having expressed his intention to return to his domicile of origin when that had been done, there could never have been any intention of permanently abandoning the domicile of origin or permanently making his home in the domicile of choice.

Yet in cases like *Bruce v. Bruce* (1), where the intention was throughout clearly expressed, namely, a wish to return to the domicile of origin, and peculiarly in such cases as *Cockrell v. Cockrell* (4), where the domicile of choice had clearly been selected for no other purpose than that of trade, the Judges seem to have had little hesitation in coming to the conclusion that because at the time of taking up their habitations in Calcutta, Bruce and Cockrell could not put a definite limit upon their sojourn there, this constituted a domicile of choice by residence accompanied by an intention that that residence should be permanent. What was probably really meant in all cases of this kind was that a person leaving his domicile of origin and making his residence in another country for a period entirely indefinite might be shown to have intended, either at the commencement or at any time during the currency of that residence,

to have made it permanent, and entertaining any such intention at any moment of time in combination with the fact of residence would, no doubt, constitute an abandonment of the domicile of origin and an acquisition in substitution for it of a domicile of choice. What appears to be the difficulty in such cases as those I have referred to is that in the absence of express declaration, it is hardly possible to infer from a mere residence for an indefinite period but for a definite purpose an intention permanently to abandon the domicile of origin. It is clear that in the like set of facts with the addition of express declarations to the contrary such as were to be found in *Bruce's* case (1), the conclusion drawn by the Courts of Scotland and England must be thought in logic however good in law, to be somewhat defective. It might be open to a Court to infer an intention from facts laid before it in the absence of any declaration either way; but with a declaration distinctly negating the intention to remain there permanently, I think, if the Courts have nevertheless found that intention from the facts, it must be referable to some other explanation than any which I so far have been able to discover.

But this much is clearly a part of the law of domicile, as I have already said, that a person may abandon his domicile of origin and acquire a domicile of choice absolutely good in the eye of the law and retain that domicile of choice as long as he pleases and may then again change his mind and determine either to substitute another domicile of choice for that which he means to abandon, or to resume his domicile of origin. I use the word "resume" rather reluctantly here, because, its use at least in one case has, I think, led to a decision which can hardly be good law. It is important however never to lose sight of this, that just as a domicile of choice is easy to acquire, so it is as easy to abandon. But for its abandonment two things are necessary the abandonment in fact, and the intention that that abandonment shall be final and permanent. A man having acquired a domicile by choice may, after many years, turn home-sick and decide to abandon his domicile of choice and again accept his domicile of origin. But if with that intention clear in his mind he should fail actually to abandon

4. (1866) 25 L J Ch 730.

his domicile of choice and die before thus far giving effect to his intention, the result would be that the domicile of choice would persist and the distribution of his estate would have to be governed by it.

In the case of *In the goods of Raffanel* (5), which so eminent a jurist and commentator at Dicey declares to have been well decided, with the greatest deference both to the learned Judge, Sir C. Cresswell, who decided the case, and to Mr. Dicey, I think it is easily demonstrable that the decision was wrong and as easy to show how it came to be wrong. The facts there were that an English woman, whose domicile of origin was, of course, English, married a Frenchman and so acquired, by operation of law, a French domicile. After her husband's death, she made up her mind to abandon her French domicile and again accept her domicile of origin. With that intention in her mind she actually did abandon her French domicile in Dunkerque and got as far as Calais, where she went on board an English steamer, but being taken ill, she had to land and return to Dunkerque, and the illness never leaving her, died there. This was as clear a case, I think, as any case ever could be of a *de facto* abandonment of a domicile of choice accompanied by an intention never to return to it.

It may be conceded that throughout the trial no question whatever was made of both these facts. Therefore in law Mrs. Raffanel had completely divested herself of her domicile of choice the moment she quitted her residence at Dunkerque with the intention of never returning to it. But Cresswell, J., appears to have thought that as a person cannot be without a domicile, it was necessary for her to have effectually resumed her domicile of origin, that is to say, to have landed in England before she could divest herself of her domicile of choice. But nothing is clearer in the law of domicile than that the moment the domicile of choice is abandoned, the domicile of origin revives *proprio vigore* and without the need of any intention or further act on the part of a person; for example, if Mrs. Raffanel, instead of intending to return to England and take up her abode there, at the time of her leaving Dunkerque meant to make a voyage round the

world in quest of some other place which might be pleasing to her and died on that voyage, say, at the Canary Islands, there would be no question of any resumption, in the sense in which Sir C. Cresswell used that word of the domicile of her origin. Yet it is equally certain that no lawyer would have been found to make, and no Court to listen to, such a contention as that at the date of her death, having abandoned the domicile of choice, she was not subject to the domicile of origin, and the value of Mr. Dicey's comment upon the case is somewhat discounted by finding that he brackets with it such a case as that of *In re Steer* (6). Now there is absolutely nothing in common between the two cases. What was found in the case of *In re Steer* (6) was that, although the man expressed his desire of retaining his English domicile, in point of fact he had acquired a German domicile and had never had any intention whatever of abandoning it, never in fact had abandoned it, and died in Germany. All that there was to say for his English domicile was that he appears to have been under the mistaken impression that he could have two domiciles at once. Such a view was naturally rejected by the Courts, and, as the facts were found as I have stated them to be, it is clear that the case does not resemble the case of *In the goods of Raffanel* (5) in any material point, and was decided upon quite a different ground. Steer was found to have a domicile of choice and never to have abandoned it. Mrs. Raffanel was found to have had a domicile by operation of law, which in point of fact she did abandon and intended to abandon, but it was thought that as she had intended also to return to her native land, before she could divest herself of her foreign domicile, it was necessary that in fact as well as in intention she should set foot on her native shores. Steer never had any intention of abandoning his domicile. Mrs. Raffanel had. But the Courts thought that she had failed, fully and to the satisfaction of the law, to carry it out. That the latter view was wrong I have not the least doubt.

These, then, are some of the principal points of interest which have struck me in a review of the whole case-law and

5. (1863) 32 L J P C 203=3 Sw & Tr 49.

6. (1858) 3 H & N 594=28 L J Ex 22.

most of the authoritative writings of the jurists upon this subject. Perhaps the best definitions of "domicile" are those of Vattel and Savigny, though I think they are, certainly the last, too overloaded with terms; and for all practical purposes I do not see how a "domicile of choice" can be better defined than it is by Lord Halsbury in *Winans v. Attorney-General* (7) as a permanent home, that is to say, a man, who takes up his residence in a place other than that of his domicile of origin, makes it his domicile of choice, if he intends that it should be his permanent home. And the same simplicity and clarity are obtained by our own legislature in S. 10, Succession Act, where it is said that a man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. Here, no doubt, the term "fixed" is not quite so definite as the word "permanent" but it certainly has the same meaning in this context; and it is of the essence of the domicile of choice that the residence should be intended to be permanent, that is to say, a man making this choice should mean it to be final and definitely intend quatenus in illo exuere patriam, that is to say, to end his life in the residence which he has thus chosen, in a new place or country. Once that is clearly understood, taken in conjunction with what I have said already as to the ease with which this choice may be exercised, there should be no great difficulty in at once determining the proposition of law to which evidence is being led, whether a person has acquired a domicile of choice in a competition between such alleged domicile of choice and his domicile of origin.

The indefiniteness of duration which has led to a great deal of confusion, I think, in the discussion upon this subject is on much the same level as the emphasis with which Judges, doubtless with the laudable desire of informing and instructing those who come after them, have insisted upon the length of time as a ground of inference. It is in the constant transition from definitions of true legal notions to generalizations in quite a different field, and in a field in which generalizations are not admissible at all, that the case-law on

7. (1904) A C 287=73 L J K B 613.

this subject is, as I said in an earlier passage of this judgment, so conspicuously baffling and confused. It is one thing to have clearly in view a legal notion or a legal principle. It is quite another to attempt to lay down rules for the guidance of Courts as to the manner in which inferences of facts are to be drawn from particular pieces of evidence. Here every Court will have to decide for itself on the facts laid before it and it is worse than useless to attempt to lay down, in one case and with an eye to the particular facts therein disclosed, general rules for the guidance of other Courts in applying the same principles of law to necessarily varying sets of facts. It has always been a favourite dictum of Judges expounding this part of the law, that the length of residence is a very strong ground for inferring (where there is absence of express intention) an intention to make a residence so long inhabited, a fixed habitation or permanent home. It ought to be evident, however, that such a generalization as that is infirm in character and open to many exceptions. Nor looking at the actual contents of the legal notion can it be said that duration of time has anything to do with the complete acquisition of a domicile of choice. In 90 cases out of hundred where it is a true case of acquisition of domicile by choice, the choice is made synchronously with the taking up of residence, that is to say, the domicile of choice is complete and has the effect of ousting the domicile of origin from the very first moment that the new residence is taken up. There are cases (and perhaps I have put the first percentage too high), there are cases doubtless in which a man drifts as it were into the notion of domicile of choice, although it would be extremely hard to say at what point the intention which was not there at the beginning had formed and defined itself. Such a case was that of *Winans v. Attorney-General* (7) decided in 1903.

It can hardly be said that the final decision of the House of Lords carries any very great conviction with it or that the methods of reasoning and discussion adopted by such eminent Lords as Lord Halsbury and Lord Macnaghten are any more convincing than those of Lord Lindley. I have not been able to

find the record of this case in the Court of Appeal, but if the full array of judicial talent that was employed upon it were available I dare say that I should find as many eminent and learned Judges inferring from the fact one way as the other. And whatever may be said for the legal superiority of the decision arrived at by the majority of the House of Lords, I think that the weight of common sense would certainly be disposed to support the dissenting judgment of Lord Lindley. For this was surely a case of acquisition of domicile of choice, if indeed the domicile was so acquired, not by original intention synchronizing with the first taking up of residence in England, but by the slow compulsion of time and circumstances which must have, before Winans died, as Lord Lindley thinks, finally caused him to give up all hope of returning to his native Baltimore. But the majority of the House of Lords insisted here upon the need of proof of definite intention at any given moment, that is to say, they wanted to be satisfied that notwithstanding the virtual impossibility of Winans ever returning to America or quitting the domicile of choice (although no doubt it was in the first place compulsion rather than choice which led him to it), that he had this definite intention and failing that, they say, no amount of inferential evidence will satisfy them that he had formed any such intention and so had abandoned his domicile of origin.

As I say, there may be cases of that kind but in a large majority, where it is a genuine case of domicile of choice, the choice is made probably before the residence begins, as in the case of emigrants to America who never intend to return to their native land. Therefore, in the absence of intention either way, the long duration of residence in a foreign country terminated by death may certainly be a ground for inferring that synchronously with the commencement of that residence there had been an intention of making the residence permanent. Inferences of that kind may easily be rebutted by facts which would explain the duration of residence compatibly with an intention to return to the domicile of origin, and the law, it must be remembered, leans very strongly in favour of the reten-

tion of the domicile of origin. It is thought that a man does not lightly give up his domicile of origin and substitute for it a domicile of choice. That being so in every case where there are no declarations of intention either way Courts, no doubt, would be slow to infer from the mere fact of residence, however protracted that residence may be, the intention requisite to complete the substitution of domicile of choice for that of origin. While the ground of inference, then, is thus seen often to be so insecure, the English Courts have not hesitated frequently to declare that the actual declarations of intention are but of secondary value and should be postponed to inferences drawn from proved facts. This is particularly applicable to mere declarations in instruments which are sometimes hardly more than descriptive. Still the question being given the facts of residence what was the intention of a man thus taking it up, I should certainly have thought that no better evidence could have been found than his own statement of intention one way or the other, if that could be proved.

In some of the judgments I have read, the Courts discounted the value of direct evidence of intention, on the ground of the untrustworthiness of human memory or the inaccuracy with which witnesses have reported conversations which must have taken place many years ago. But that, of course, amounts to no more than saying that the Courts may not be satisfied that the declarations of intention were ever made and is no reason at all for diminishing the value which ought to be attached to them, if they are proved to have been made. In every case where the question is, whether a man has acquired a domicile of choice, the Courts have first to be satisfied that he had a residence in the new place or country and that in taking it up he intended it to be his permanent home, and no amount of additional definition refining upon this term or upon that could ever carry us beyond this point. We must always come back to it. In every case it must be a pure question of fact and in every case that question of fact must be answered upon the evidence laid before the Court. It is idle, indeed, I think it is absurd, to enumerate what are called the *indicia* of an intention to make a residence a man's permanent

home. Nor can there be any question, as will appear from the language so often used in the English Courts of the degrees of clearness with which such an intention must be made out. The onus being upon the person alleging that a man has acquired a domicile of choice, he must prove to the Court that that man had that intention. It cannot be proved more or less clearly. It must be proved or not proved. If it is proved, there is an end of the matter in favour of him who alleges that a domicile of choice has been acquired. If it is not proved, then there is an end of the matter the other way. That being the law as I understand it, and the question thus being narrowed down to a mere question of fact, I have to consider what the proper conclusion is to be drawn from the evidence laid before me.

It is not admitted that Pascoal Pinto had a Portuguese domicile of origin; but it is admitted that he was born in Goa. His name is that of a Goan. He had property in Goa which is described as an old family house and on several occasions during his longstay in Bombay he returned to Goa and lived on his own property there. I cannot entertain the least doubt but that the domicile of his origin was Goan or Portuguese. At the early age of fourteen he appears to have drifted into Bombay and to have lived there uninterruptedly, with the exception of brief visits to Goa, till his death in June 1915. In 1871, he married his first wife, the mother of the defendants. She died in 1901, or early in 1902, and he remarried the present plaintiff in 1903. What he did during his early years in Bombay we do not know. But during the whole of his mature life, he appears to have been conducting a fairly flourishing coach-building business, and he provided himself with a house adjoining his factory. The house was probably of little value, though it is stated in the schedule annexed to the Probate application to be worth about Rs. 2,000. Its character does not appear to have been such as to give rise in itself to any very strong inference that in building it and taking up his residence there he necessarily meant to make it his permanent home. But there is the undoubted fact that he passed virtually the whole of his long life between the ages of 14 and 71 in Bombay. The evidence

laid before me only points to his having made five short visits to Goa, during the whole of that period of something like fifty seven years. His business was in Bombay. And all these circumstances are at least consistent with the alleged contention of his having finally renounced his domicile of origin. But apart from the evidence of declarations, these facts might be insufficient. They certainly are not much stronger in themselves than the facts in *Winan's* case (7), for instance, in that case there were many other facts, which do not appear here, e. g. express intention on the part of Mr. Winans to return to America and to retain his domicile of origin.

In coming to their final conclusion upon that case however I doubt whether the house of Lords were so much influenced by these declarations of intention as by the actual facts before them, upon which they hesitated to hold that Mr. Winans had ever had a deliberate intention of abandoning his domicile of origin and substituting England for it. There are also many other points of difference, as, for example, that to begin with Mr. Winans appears to have been driven to England by consideration of health, whereas it is clear that Pascoal Pinto came to Bombay of his own accord and remained here ever since, not under any compulsion but because he preferred to live in Bombay. Assuming, then, that so far the facts might give rise to nicely-balanced inferences either way, we have to add to them certain other facts, which might tell against the conclusion that notwithstanding his long residence in Bombay he had never intentionally abandoned domicile of origin. Such probably are his return, whenever he left Bombay, to his native village of Calangute; the fact that he had an old house there which he relinquished to purchase land and build a new house upon it; and that very shortly before his death he was certainly spending money upon repairing that house. His children resided for some part of their lives in Goa and one of them appears to have been brought up there with the idea of being ordained a priest. Subsequently he gave up the priesthood and has taken up a lay profession in Karachi. Still these are all points to be considered in

judging of the probable truth or otherwise of the evidence given as to the actual declarations of the deceased himself.

Here we have for the defendants, who opened upon this point the evidence of defendant 1 himself, followed by eight witnesses, four of whom are Parsees, two are Hindus and two Goans. And the gist of this evidence is that at any rate during the later years of his life, Pascoal Pinto not once but many times declared to these witnesses that he had no desire whatever to return to Goa, that his life had been spent in Bombay, that all his interests were in Bombay, that his business was there, and that he felt that if he abandoned his business and returned to Goa, he would very soon die. Now, it is to be observed that the inferences drawn from protracted residence are always liable to be explained by sufficient cause being shown (a cause compatible with retaining an intention to return) for remaining so long out of the domicile of origin. As, for example, where a man is engaged, as the deceased was engaged, upon a fairly profitable business, so long as his residence out of the domicile of origin was conditioned merely by his desire to carry on that business and make a competence out of it, no matter what the length of that residence might be, no inference of any value can be drawn from it in favour of a deliberately formed intention to abandon the domicile of origin. This consideration has been expressly provided for by the Indian Legislature in S. 10, Succession Act. So that the case would always be weak where the length of residence out of the domicile of origin was fully occupied in the conduct of trade or business. If the business had been concluded some years before Pascoal Pinto's death and notwithstanding that, he had continued to reside and live upon his gains in Bombay, then it could have been inferred with tolerable certainty that at no time had he ever intended to return to Goa. But that was not the case here. He died before concluding his business and there is evidence, as I shall presently show, that shortly before his death at any rate he was contemplating a return to Goa. Nevertheless, I have to consider the value of the evidence of actual declarations.

Now, the first of these witnesses, neglecting for the present defendant 1 him-

self, is one Chhotalal Jekinsondas. It is very difficult to see why this, or for that matter, any of the other witnesses who have come forward to depose in defendant No. 1's favour, should care to take the trouble to come to Court and deliberately perjure themselves. Only two of them belong to the same nationality as the deceased, and these two are perhaps the least important, viz., Abel Braganza Pinto and Camillo D'Souza. This witness Chhotalal Jekinsondas was once a solicitor's managing clerk and later became a pleader of this Court. He appears to have been on terms of intimacy with the deceased Pascoal Pinto during the latter part of his life.

Pinto consulted him on legal matters and used to ask him to draw up notices and do other small legal jobs for him. He also drew the last will and testament of Pascoal Pinto in 1909, in which Pascoal Pinto is described as Portuguese inhabitant of Bombay. I attach little or no importance to such a description in a will so drawn, because I do not suppose that Jekinsondas' attention was drawn to any such question as that of domicile and he would probably have followed the ordinary forms in use in Bombay in such cases. Nor indeed would it necessarily follow from the words employed that Pascoal Pinto meant to do more than state the simple fact, viz., that he was of Bombay at the time, and to go further and renounce his original domicile of origin by such a declaration. But this witness with all the rest is positive that on many occasions during the years of his intimacy with Pascoal Pinto, the latter frequently said to him that he had nothing more to do with Goa and that his desire was to remain permanently in Bombay. To the same effect is the evidence of the next witness Panthaki, generally known by his trade name of Katrak. He has a sodawater factory in the same part as the coach factory of Pascoal Pinto and appears to have been on very friendly terms with him for many years. It is urged against all these witnesses that their story is absurd on the face of it; that it is most unlikely that they would have constantly urged Pascoal Pinto to give up work and retire to Goa and he as constantly should have repeated to them that he had nothing whatever to do with Goa and meant to live and die

in Bombay. After Katrak we have the evidence of Dadina, a highly respectable and educated gentleman whose word seems to be beyond question.

He however was only acquainted with Pinto for about a year or at the most two years before his death; but his evidence is very important as showing that even at that late period Pinto's intention of living and dying in Bombay had remained unshaken. Dadina says that as late as 1914, when Pinto's health was beginning to fail, he suggested to him a return to Goa, but Pinto would have none of it; and Dadina then proposed that he should give up his business and seek to improve his health by taking a house at Versova. This seems to have appealed to Pinto at the time, but the scheme fell through as he was unwilling to pay the rents demanded by landlords in that locality. Still, if this be true and if Pinto really contemplated passing his closing years at Versova, that is consistent with the story told by the other witnesses for defendant, that he did not intend to end his days in Goa during the last two or three years of his life. No attempt was made to discredit this witness; but it was probably because his evidence does not carry the proof of any express declaration back to the date which is really important, namely, the date of the deceased Pinto's marriage with the plaintiff in 1903.

We come now to the witness Lelinwalla, who professes to have held some kind of conversations with the deceased at least as far back as the date of his marriage with the plaintiff. Lelinwalla is an old man and a rival coach-builder, but he seems to have been on very good terms with the deceased Pinto. And he says that he frequently suggested to him that he had much better give up his work now that he was growing old and retire to his native land, but Pinto always declined to entertain any such idea saying that he would die if he stopped work and that he intended to end his days in Bombay. Very little could be said against witnesses of this kind, except the general criticism that they may have some covert interest in the success of the defendant, and the story that they have to tell is so easy and simple that they need not fear detection even if every word is perjured. But that

kind of criticism can hardly apply to a man like Dadina or even Panthaki and Seervai and Lelinwalla. It is quite likely that both Lelinwalla and the Hindu witness, Govindji Pillaji, have stretched a point or two at the defendant's wish so as to carry their recollection back to a point before the marriage of Pinto with the plaintiff. It seems to me at least questionable whether either Lelinwalla or Pillaji can really recollect that the first of these conversations just happened before the death of the deceased's first wife and therefore of course necessarily before his marriage with the plaintiff. Nor do I really attach very much importance to a point which, I suppose, the defendant thought must be got over by evidence of this kind. After Lelinwalla we have the evidence of Seervai and that is important in one particular, because while he generally confirms the other witnesses as to the nature of the declarations of intention, frequently made to him by the deceased Pinto, he put in one little characteristic touch of his own. He said that once when he was chaffing the deceased Pinto about his never riding in a carriage himself Pinto said: "Well, one day at any rate I shall ride in my carriage and pair to Matunga." That means that he intended to be buried at Matunga, and if he really said it and really meant it, it would imply that he had at that time made a deliberate choice and made Bombay his permanent home. The witness Govindji Pillaji is another old witness like Lelinwalla who professes to recollect declarations of intention made by the deceased going back much further than those made within the hearing of other witnesses. He is a man dealing in sheet-iron with his works in the same part as the deceased's coach-building factory, and no reason is suggested why he should interest himself in this case or come forward to give perjured evidence in favour of defendant 1. Then there is the witness Abel Braganza Pinto from Goa, whose evidence is chiefly important because, in a conversation, he says he had, apparently recently, with the deceased Pascoal Pinto on the subject of his will, Abel Braganza Pinto says that he reminded Pascoal Pinto that being a Portuguese subject the disposition of his will would be invalid under the law of that country, but that

Pascoal Pinto said to him that he had become a British subject and had nothing to do with the law of Portugal. Now, if that be a true report of what passed, confirmed by the wording of the will, it would be conclusive evidence not only of what his intention was but what it all along had been. I do not attach much importance to the evidence of Camillo D'Souza, the baker, and I think it is unnecessary to dwell upon it.

Now, in addition to this oral evidence, I should mention that two of the members of Pascoal Pinto's family, that is to say his first wife and one of his sons, died in Bombay and were both buried in the cemetery at Dharavi. He purchased a grave on both occasions and it is suggested by defendant 1 that a necessary inference arises from this that he desired himself to be buried, when his time came, in his first wife's grave. And the evidence of the witnesses, I have already mentioned, sometimes goes the length of saying that they heard him express that intention or desire. Standing by itself, the purchase of these graves would not give rise to a very strong inference that Pascoal Pinto had formed the intention of renouncing his domicile of origin and acquiring a Bombay domicile in place of it, because the evidence is that these graves are for periods of two years and unless purchased may be re-opened and used for the interment of other corpses. So that it was very natural that any man possessed of sufficient means would desire to preserve the remains of those dear to him free from the risk of being thus disturbed after so short a period as two years, and the fact that Pinto not only bought his first wife's grave, but that of his son and that the cost of a grave is not more than Rs. 50, would certainly go far to reduce the value and cogency of any inference to be drawn from these facts alone. On the other hand, we have the evidence of the plaintiff supported by six Portuguese witnesses, all of whom declare that at any rate during the last two or three years of his life and particularly at the time of his last illness, the deceased Pascoal Pinto had expressed to them his desire to hand over his business to one of his sons, settle up all his affairs in Bombay and retire for the rest of his days to his property in Goa. The evidence also relates to his sending

the plaintiff herself to Goa in April 1915 for the sole purpose of repairing this house and making it fit to be the final residence of Pascoal Pinto and herself. I think that so much of the evidence for the plaintiff is probably true. I think she was sent to Goa in April and Pascoal Pinto gave her money to spend on repairing the house. Her version, supported by that of Resurrection dos Santos, is that she was given Rs. 100, in cash when she left Bombay for Goa; that Rs. 50 were sent her by registered letter; and that Rs. 100 were sent her by the hand of this Resurrection dos Santos when he himself went to Goa a short time afterwards. She was also authorized to collect some Rs. 19 in Goa. So that in all she is supposed to have spent about Rs. 270 upon the house. But the rest of the evidence of these witnesses is of little importance, I mean so much of it as professes to report declarations of intention made towards the close of his life by the deceased Pinto. For, as I shall show in a moment, I have very little doubt that when he found his end drawing near his thoughts naturally turned to the land of his birth and he may have felt at such a time, as in all human probability he would, a sense of home sickness and desired to return and end his days in his native land.

But I think that the rest of the evidence, which I have summarized, relating to the actual declarations so repeatedly made by Pascoal Pinto during many years of his life, taken in conjunction with the undisputed facts, would fully warrant me in coming to the conclusion that between the years, I will not say of 1858, because he must have been a boy then, let me say 1865, when he had attained majority, and 1913, when his health began finally to give way he had taken up a habitation in Bombay meaning it all that time to be his fixed habitation or to use Lord Halsbury's phrase "his permanent home." That finding amounts to this, that at any time between 1865 and 1913 Pascoal Pinto had acquired a domicile of choice in Bombay in substitution for the domicile of his origin in Goa.

I do not doubt that had he lived a few years longer he would have divested himself of that domicile of choice and returned to his native land, passing the last years of his life in his own house

there and so reverting to his domicile of origin. Time was not given him for this. But it is quite likely that he intended, after having had the house repaired, to return, to it when the monsoon was over, but his last illness overtook him in May and he died in June. At that time I am ready to believe that he had the intention of divesting himself of his domicile of choice and thereby reviving by operation of law his domicile of origin, had that intention only been accompanied by the requisite fact, that is the abandonment of his domicile of choice. It is admitted that he never did abandon what I have now found to be his domicile of choice in Bombay. Whatever, then his intention may have been, as deposed to by the witnesses for the plaintiff, the law of the matter is clear. The domicile of choice, namely, Bombay, supersedes the domicile of origin, and the making of his will and all other matters, governed by the Indian Law of Succession, are to be determined as though Pascoal Pinto had all along, from the year 1865 to the time of his death, been a British subject domiciled in Bombay.

That, I think, will dispose of the whole case, since I do not understand that any part of the plaintiff's claim or that put forward by defendant 3 is maintainable, except upon the supposition that at the date of Pascoal Pinto's marriage with the mother of defendant 3 in 1871 or with the plaintiff in 1903 his domicile of origin persisting, he was a Portuguese subject and governed by the law of Portugal. I have come to my conclusion upon the acquisition of a domicile of choice, not upon direct evidence going so far back as the date of Pascoal Pinto's marriage with the mother of defendant 3 or depending much upon the evidence actually relating to a period before the marriage of Pascoal Pinto with the plaintiff. It would hardly be possible in cases of this kind to bring forward evidence of actual declarations made so far back as 1871, nor would any Court be inclined to believe oral evidence of that kind if it was tendered. But finding all the facts to be consistent with the later declarations, it seems to me not only to be logically justifiable but almost necessary to conclude that the intention had existed throughout the whole period of the long-drawn-out resi-

dence here. I must therefore find upon this issue in favour of defendant 1 and against the plaintiff and defendant 3. The suit will now be dismissed with all costs.

G.P./R.K.

*Suit dismissed.***A. I. R. 1916 Bombay 178**

BATCHELOR, AG. C. J. AND HEATON, J.
Krishnaa, Kering & Co.—Plaintiff.

v.

J. R. Miller—Defendant.

Original Civil Appeal No. 2 of 1916,
and Suit No. 818 of 1915, Decided on
24th August 1916.

Criminal P. C. (1898), S. 195 (6)—Extension of time.

The High Court has power to extend the time of a sanction to prosecute, even after the expiry of the six months for which it remains current: 32 Cal 379, *not Appr*; 26 Mad 480, *Foll*.

[P 179 C 1]

*Strangman—for Plaintiff.**F. S. Taleyarkhan—for Defendant.*

Batchelor, Ag. C. J.—This is an application to extend the time for the prosecution of the appellant in respect of an offence of giving false evidence said to have been committed during the hearing of a suit before Beaman, J. Sanction was granted under S. 195, Criminal P. C., on 6th December 1915, and by virtue of sub S (6) of that section, the sanction could not remain in force for more than six months from the date on which it was given. Consequently the period of the currency of the sanction has expired several months ago. It is, I think, clear that if we have the power now to extend the time, we ought to extend it, seeing that the responsibility for the delay which has occurred does not rest with the present respondent, but with the appellant himself. But it is contended that, under S. 195, it is not competent to this Court to make an order extending the period when in fact the six months' time has elapsed. When that time has elapsed, it is said there is nothing to extend and support for this contention is found in the observations of the Calcutta High Court in the case of *Kali Kinkar Sett v. Dinobandhu Nandy* (1). Those observations were however admittedly obiter, and the contrary view appears to have been accepted by the Madras High Court: see the decision in *Karup-*
1. (1905) 32 Cal 379.

pana Servagaran v. Sinha Goundan (2). I am conscious of the weight of Mr. Strangman's argument that the words of S. 195, Criminal P. C., may be contrasted, to his advantage, with the words of S. 2, Arbitration Act (9 of 1899) and para. 8, Sch. 2, Civil P. C. In these two latter provisions power is given in express terms to extend the original period at any time even after the lapse of that period. In the Criminal Procedure Code it must be admitted that the power is not so expressly conferred, and the words are susceptible of the narrower construction for which Mr. Strangman presses. At the same time, as it seems to me, there is nothing in the words which requires that construction, and they are equally patient of the more liberal reading.

I am in favour of the more liberal reading, because in my opinion the contrary view, not being imposed by the words of the Act, would tie the hands of the Court very inconveniently would produce inequality and even caprice in actual results, and would lead to graver inconveniences, in practice than it is likely that the legislature could have contemplated. It is not denied that if the application to extend the time, though made during the currency of the sanction, were heard and decided after the expiry of the original period, the Court would have power to grant it, and I do not think that the Court is necessarily deprived of jurisdiction merely because the six months had expired before the application was made. I think therefore that we have the power now to extend the time *nunc pro tunc*, and I would extend it by a further period of one fortnight from this date. Notice absolute. No order as to costs.

Heaton, J.—I agree.

G P./R.K

Notice absolute.

2. (1903) 26 Mad 480.

A. I. R. 1916 Bombay 179

BATCHELOR, AG. C. J. AND SHAH, J.

Ganesh Krishna Kulkarni and others
—Plaintiffs—Appellants.

v.

Damoo Nathu Shimpi and others —
Defendants—Respondents.

Second Appeal No. 13 of 1915, Decided on 25th August 1916, from decision of Ag. Dist. Judge, Khandesh, in Appeal No. 451 of 1912.

(a) Civil P. C. (14 of 1882), S. 282—S. 282 applies only where the Court is satisfied that property is subject to a mortgage or lien—In such cases Court can continue attachment.

Section 282, Civil P. C., only applies to a case where a Court is satisfied that property is subject to a mortgage or lien, and in that case it enables the Court to continue the attachment of that property. 1 A L J 531, *Ref.* [P 180 C 1]

(b) Civil P. C. (14 of 1882), Ss 283 and 287—Mortgagee applying that attached property should be sold subject to his mortgage—Order rejecting such application does not come under S. 283 and is not subject to rule of limitation in Art. 11, Lim. Act.

An order rejecting an application by a mortgagee of attached property asking that the property should be sold subject to his mortgage, is not an order under S. 283, Civil P. C., and is not subject to the rule of limitation contained in Art. 11, Lim. Act: 22 Bom 640, *Dist.* [P 180 C 1]

P. B. Shingne—for Appellants.

S. R. Bakhale—for Respondents.

Judgment.—The facts upon which this second appeal has to be decided are these: The plaintiffs sued to recover a sum of money on a mortgage bond passed on 22nd December 1882 and their suit has been dismissed as being barred by time. It appears that in *darkhast* No. 458 of 1883, the mortgaged property in dispute had been attached at the instance of the defendants' father under a decree obtained by him in a suit of 1882. By Miscellaneous Application No. 39 of 1883, the plaintiff's father applied to the Court that the property should be sold subject to his mortgage lien. But, in June 1883, the Court rejected this application and ordered that the property should be sold free from the alleged mortgage in favour of the plaintiffs' father. In consequence of this order the defendants met the plaintiffs' present suit with the objection that it was out of time, inasmuch as it was filed more than a year after the date of the Court's order rejecting the plaintiffs' father's application, and that order was, according to the defendants, to be referred to S. 283, Civil P. C., 1882, read with Art. 11, Lim. Act.

Both the lower Courts have acceded to this contention of the defendants and the question is whether they were right in so doing. We have looked into the proceedings connected with the plaintiffs' father's application (Ex. 25) and from the terms of the application itself, as well as from the circumstances surrounding its presentation, it is clear

that the application must be referred to S. 287 of the Code of 1882, and not S. 278. The application in terms professes to be made in response to a notice from the Court inviting the assertion of any claims of right by persons conceiving themselves to possess such claims. It is not questioned that if the application falls under S. 287, then the one year's limitation prescribed by Art. 11, Lim. Act, in regard to suits against orders under S. 283 is inapplicable. Furthermore, we are of opinion that, apart from the character of the application itself, the Court's order cannot properly be referred to S. 283. In this case, as we have said, the order was that the attachment should proceed free from the lien or mortgage claim. With such an order as that, S. 282 seems to us to have no concern. S. 282, as we read it, is an enabling section, empowering the Court to pass a certain specified order on the fulfilment of two specified conditions. The conditions are: (1) that the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession and (2) that the Court in its discretion thinks fit to continue the attachment. Where those two conditions are satisfied, then the section empowers the Court to continue the attachment subject to the mortgage or lien. But an order which refuses to acknowledge the mortgage or lien and directs the continuance of the attachment free from such mortgage or lien is, in our opinion, incapable of being ascribed to this section. That is the view which was accepted by Stanley, C. J., and Burkitt, J., in *Durga Prasad v. Mansa Ram* (1), where the learned Chief Justice says:

"Section 282 only applies to the case where a Court is satisfied that property is subject to a mortgage or lien, and in that case it enables the Court to continue the attachment of that property or to dissolve the attachment as in its discretion it may think fit, but if it do continue the attachment, it must continue it subject to the mortgage or lien which has been established to the satisfaction of the Court."

We entirely agree with this explanation of the purview of S. 282, except that we are, with respect, unable to follow the necessity for the words, "or to dissolve the attachment as in its discretion it may think fit." Mr. Bakhale for the respondents contended however that

1. (1904) 1 A L J 591.

the point under discussion has been decided in his favour by a ruling of a Bench of this Court in *Nemagauda v. Paresha* (2), and it is true that the law as to the position of an unsuccessful objector or intervenor is at p. 643 of the report stated so broadly that some countenance for Mr. Bakhale's argument may be extracted from the passage. But if the facts of the case be considered in reference to the actual decision, it is, we think, clear that the ruling is of no authority in the circumstances now before us. For the question debated in *Nemagauda v. Paresha* (2) was not whether the party there concerned namely the respondent, was or was not barred by an order properly to be ascribed to S. 282, but whether the bar imposed by an order under that section was or was not removed by reason of the fact that the appellant-auction-purchaser's suit against the respondent was brought within 12 months from the Court's order; in other words, for the purposes of that case it was assumed that the respondent was an unsuccessful intervenor or objector under Ss. 278 to 282. But the point there assumed is exactly the point which in this case falls to be decided. We infer therefore that there is nothing in *Nemagauda v. Paresha* (2) to debar us from deciding the present appeal on its merits and for the reasons which we have given we think that the lower Courts were wrong in holding that the order made by the Court was an order under S. 282. It follows that the appeal must be allowed, the lower appellate Court's decree must be reversed and the suit remanded to be tried on its merits. Costs will be costs in the suit.

G.P./R.K.

Appeal allowed.

2. (1918) 22 Bom 640.

A. I. R. 1916 Bombay 180

SCOTT, C. J. AND HEATON, J.

Mahomed Haji Essack Elias—Plaintiff—Appellant.

v.

Abdul Rahiman Shaikh Abdul Aziz and others—Defendants—Respondents.

Original Side Civil Appeal No. 56 of 1915, Decided on 24th January 1916.

Presidency Towns Insolvency Act (1909), S. 18 (3)—Stay of proceedings.

The words of S. 18 (3), are wide enough to justify a stay of proceedings in an action which

was not pending at the time of the order of adjudication. [P 181 C 1]

Bahaduri and Inverarity—for Appellant.

Desai—for Respondents.

Judgment.—There are two questions in this case. The first is whether the learned Judge in making the stay order which is under appeal acted without jurisdiction. It was contended that S. 18 (3) was the only section which could apply and that only applied where a suit had been instituted before the adjudication order was made. We have however been referred to the observations of the Division Court in England in *Brownscombe v. Fair* (1), expressing the opinion that the corresponding words of S. 10, English Bankruptcy Act, which are practically identical with those of S. 18 (3), Presidency Towns Insolvency Act, were wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication.

The only other question is whether the learned Judge was wrong in exercising his discretion in the way he did to stay proceedings. The insolvent, it is true, has been guilty of many acts which incurred the severe reprobation of the Judges both in the Insolvency Court and in the Court of appeal, and for that reason it was held by the Court of appeal that he should not be protected, after having his discharge refused, against such action as his creditors might be in a position to take against him. The only effective appellant in the appeal was the judgment-creditor who was added during the pendency of the appeal. It is said there is one other judgment-creditor and the result of the appeal would be that, at all events, with regard to those judgment-creditors in the opinion of the appeal Court they should be at liberty to enforce their rights against the insolvent's person. But that is not equivalent to saying that every one of the other 54 creditors should, as a matter of course, be allowed at this late stage to institute proceedings in respect of debts admitted in the schedule and partially satisfied by dividends declared in insolvency, in order that each of them may be in a position to harass the insolvent by proceedings for arrest. At this stage we are not concerned with

the question whether or not each of the Judges of this Bench would have made the same order as Macleod, J., in the case of this particular creditor, but we are concerned with the question whether his exercise of his discretion ought to be interfered with, and we are of opinion that there is no good reason for interference. If we were to interfere upon such materials as are before us, such interference would or might logically lead to consequences which would involve an abuse of judicial proceedings. We therefore dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 181

MACLEOD, J.

Laxmibai and others—Plaintiffs.

v.

Husainbhai Ahmedbai and others—Defendants.

Application in Original Suit No. 347 of 1912, Decided on 22nd August 1916.

High Court Rules (Original Side) Rr. 397 and 399—A commissioner appointed by a High Court can decide questions of law while taking accounts—Parties objecting should proceed by filing exceptions to his report.

A Commissioner appointed by the High Court is entitled to decide questions of law while taking accounts, and it is not open to any of the parties to the reference to ask the Judge to give his opinion on any such question which arises in the taking of accounts. It is desirable that the Commissioner should deal with such questions, and parties objecting to his decision should proceed in the ordinary course by filing exceptions to his report. [P 182 C 2; P 183 C 1]

Desai—for Plaintiffs.

Strangman—for Defendants.

Judgment.—In this suit a decretal order of reference to the Commissioner was made on 7th November 1913 to take the following accounts, viz., an account of what was due by the plaintiffs to the defendant for principal and interest on the mortgage mentioned in the pleadings on the basis of the findings on the issues therein from 23rd October 1880, and it was directed that in such account the defendant should be debited with all the rents and profits accrued from the property mentioned in the pleadings and the sale-proceeds of any machinery or building materials sold by him and be given credit for all costs and expenses properly incurred by him in maintaining the said property or working the said mills. Defendant 1 died after the said order was made and the present defen-

dants 6 and 7 are the Receivers appointed in Suit No. 936 of 1914 for administration of the estate. The Receivers brought in an account of the mortgage debt and filed it before the Commissioner. The account showed a balance of Rs. 16,73,072-2-0 due to the estate. The plaintiffs filed objections which amounted to Rs. 21,90,352-2-1. Out of these, objections against the original defendant having paid ground rent in respect of the mortgaged property alone amount to Rs. 3,69,492-8-0. Objections against the payment of insurance premia amount to Rs. 30,467-8-3. Defendants 6 and 7 objected to the Commissioner hearing these objections, on the ground that there was no dispute as to the amount paid by the original defendant by way of rent and insurance and the question whether the original defendant could have credit for the payments was a question wholly of law or of mixed law and fact and should be determined by the Judge who tried the case.

The Commissioner however expressed the opinion that under the said reference he had power to go into the questions even though they involved questions of law or of mixed law and fact. Whereupon defendants 6 and 7 moved before me for an order that directions should be given to the Commissioner that it was not open to him to determine the objections of the plaintiffs in the accounts brought in by defendants 6 and 7 challenging the right of the original defendant to have credit in the account for ground-rent and insurance premia paid by him, and that the decretal order of reference did not give him any power authorizing him to decide the said questions and, in the alternative, that, if in the opinion of the Court it was still open to the plaintiffs to raise the objections, the same should be tried by the Court. It is admitted that there is no precedent in this Court for such an application. R. 397 of the High Court Rules provides that

"the Commissioner shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient."

Rule 399 provides that

"the Commissioner, if he thinks fit, shall make a special report concerning any matter or thing arising in or about the matter referred to

him, in order that the opinion of the Court may be taken therein."

But unless the Commissioner makes a special report under one of these rules, in the ordinary course he proceeds with the reference and makes his final report in the matters referred to him. It cannot be seriously contended that the Commissioner is not entitled to decide questions of law which may arise while taking the accounts. It is impossible for the Court while giving directions for the taking, for instance, of a mortgage account, to decide all questions of law, since many such questions do not arise until the accounts are filed, as in this case, where the mortgagee in possession claims that he is entitled to be given credit for certain costs and expenses as properly incurred by him in maintaining the mortgaged property. It must often happen, as in this case, that the Commissioner cannot arrive at a conclusion without deciding questions of law. Mr. Strangman however on behalf of defendants 6 and 7, has asked me to adopt the same practice as is prescribed by the Rules of the Supreme Court. O. 55 of those rules is headed "Chambers in the Chancery Division," and under R. 69

"any party may, before the proceedings before the Master are concluded, take the opinion of the Judge upon any matter arising in the course of the proceedings without any fresh summons for the purpose."

On p. 374, Vol. 36, of the Solicitors Journal there is a note relating to an unreported case, in which an order was made by the Judge expressing an opinion under R. 69 as to the principle on which a claim against an estate should be dealt with by the Chief Clerk. An appeal having been filed against this order, no order was made on the appeal, but that was to be without prejudice to the right of the appellants to raise, upon summons to vary the Chief Clerk's certificate after it had been made, the question upon which the Judge had given his opinion. The Lord Justices expressed strongly their opinion that upon an application of this kind under R. 69 an order ought not to be drawn up, for this highly inconvenient result would follow that the order might be appealed from and the appeal might be carried even to the House of Lords and then after the certificate had been made the matter might be re-heard on an application to vary the Chief Clerk's finding and there might be

a second appeal to the House of Lords. That would be most inconvenient and oppressive. On such an application the opinion of the Judge was given for the guidance of his Chief Clerk and no formal order ought to be drawn up. Therefore if I admitted this application and adopting the practice prescribed by R. 69 expressed an opinion on the points which are now in dispute regarding the payment of ground rent and insurance premia, it might be that a party who was dissatisfied with that opinion might appeal against the order and the appeal might even be taken to the Privy Council. For it would be problematical whether this Court would follow the opinion expressed by the Lord Justices in the case I have just referred to. It would be very undesirable to introduce an entirely new procedure with regard to references to the Commissioner, unless I was of opinion that I was entitled to adopt the procedure prescribed by O. 55, R. 69, above referred to.

But I am decidedly of opinion that as in the High Court Rules there is no rule similar to R. 69, O. 55, it is not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of the accounts. From the notes in the Annual Practice, it appears that applications under that rule are rarely made. Moreover, it is not, in my opinion, in the interests of justice that parties to a reference should be at liberty to stop the proceedings by moving the Court to give its opinion on a point of law which has arisen which the Commissioner can decide. It is certainly desirable that the Commissioner should deal with such questions, and the parties objecting to his decision then should proceed in the ordinary course by filing exceptions to his report. But I must not be taken as holding that the Court, once a reference has been made to the Commissioner, loses all control over the proceedings until the Commissioner has made his report. There may be cases in which the Court may find it necessary to withdraw the proceedings from the Commissioner and resume the hearing itself, but such cases must necessarily be of rare occurrence. It is a different matter to ask the Court to resume the hearing, merely for the purpose of deciding certain questions which come within the powers of

the Commissioner. In my opinion therefore the application must be dismissed with costs.

G.P./R.K. *Application dismissed.*

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SCOTT, C. J. AND HEATON, J.

Madhavji Dharamsey Manufacturing Co., Ltd.—Defendants—Appellants.

v.

Central India Spinning, Weaving and Manufacturing Co., Ltd.—Plaintiffs—Respondents.

Originally Civil Appeal No. 44 of 1915, Decided on 18th January 1916, from judgment of Macleod, J.

Trade-mark—Infringement of—Combination of devices used—Question as to what is dominant trade-mark is question of evidence—Court can grant both injunction and damages.

A numeral or a number may be as much a trade-mark as any other design. A manufacturer can use one device or a combination of devices to denote any particular article manufactured by him. In the latter case the question as to what is the dominant trade-mark is a question of evidence, depending on which device has caught the attention of the buyers and has come to be associated with the goods of the manufacturer. [P 184 C 2]

It is an infringement of a trade-mark to copy the number assigned by a manufacturer to any article made in his factory, when the article has acquired a reputation in the market and orders have been placed for it by description of the said number. It makes no difference that the person infringing adopts a different drawing or picture along with the number. [P 187 C 2]

Where goods have acquired, by a particular fancy description, combination or device, a reputation in the market, it is immaterial that the customers do not know who the maker is. [P 187 C 2]

The questions for determination therefore in a case of an alleged infringement for a trade-mark are: (1) whether the defendant has pirated the dominant device of the plaintiff; (2) whether the defendant's conduct is such as to deceive ultimate purchasers. Proof of actual deception is not necessary. [P 187 C 2]

A Court may grant both an injunction and damages to the plaintiff in a suit for infringement of a trade-mark. The injunction should be wide enough to cover all possible channels of approach to ultimate buyers and damages should be awarded on the result of an inquiry as to profits made by the defendant by the unlawful use of plaintiff's number. [P 187 C 2]

Plaintiffs manufactured twill cloth in their mill at Nagpur which was put on the market marked as No. 2051 with the device of the serpent. This cloth was sold from 1904. The defendants who owned a mill in Bombay, also manufactured twill of similar pattern in 1913 and affixed the same number on every piece of their cloth and a label representing the image of the sun. Plaintiffs sued to restrain defendants from affixing No. 2051 to their twill cloth and for damages:

Held: (1) that No. 2051 was plaintiff's trade-mark and that the defendants infringed it by copying the number; (2) that an injunction restraining the defendants from using the said number on their cloth anywhere in India and award of damages to the plaintiffs on the amount of the profits made by defendants by sale of their twill cloth were appropriate reliefs: 24 Cal 364, *Dist*; *Singer Manufacturing Co. v. Loog*, (1880) 18 Ch D 395 and *Lever v. Goodwin*, (1887) 1 Ch D 36, *Ref.* [P 187 C 2]

Setalvad, Kanga and Vakil—for Appellants.

Desai, Inverarity, Strangman and Jinnah—for Respondents.

Macleod, J.—The plaintiffs are manufacturers of cloth which they manufacture in their Mill in Nagpur, in the Central Provinces. In 1904 they commenced to manufacture a certain quality a black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill was distinguished by No. 10. The No. 2051 was in no way descriptive of the twill cloth. On each piece of cloth was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill. This mill was put on the market in the North-West Frontier Provinces, Sind and the Punjab where the plaintiffs have got their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants, who were a company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051" with the No. 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants, put in as an exhibit in this case, and there was also a white ticket bearing the defendants' name and other particulars.

The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its

number alone, so that anybody who wanted to buy the plaintiffs' black twill would not write an order "a bale of black twill from Nagpur mill bearing the mark of the serpent and the No. 2051", but would simply order "a bale of black twill No. 2051." The plaintiffs contend that they have established this by their evidence and that they are therefore entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights.

I think there can be no doubt that a manufacturer can establish the right to the use of a particular number as a trade-mark, as well as a right to use a particular device, or he may use the two in conjunction. Therefore, it does not matter much what the particular drawing or number on the manufactured goods consists of, provided that the goods become known in the market by that particular device or number. Then if there is a device as well as a number, it depends on the evidence in each case as to what is the dominant part of the manufacturer's mark, whether the device or the number or the two in conjunction, and if the plaintiffs establish the fact on their evidence that goods have become known in the market and are sold by that particular number, then it is not necessary for them to prove that the purchasers have actually been deceived by the defendants using this particular number. But it is for the plaintiffs to satisfy the Court that the similarity between the respective marks of the plaintiffs and the defendants is such as to be calculated to mislead purchasers. It is permissible for the plaintiff to ask for an injunction against a rival trader, as soon as he knows that other goods bearing his mark and stamp are found placed on the market. When the plaintiffs' black twill was placed on the market it was probably known either as Serpent Chap or Naug Chap No. 2051 of the Empress Mills or perhaps by the description Empress Mill Naug Chap; but the evidence adduced now proves conclusively that, as time went on, purchasers, whether retail or wholesale, and wholesale dealers may be purchasers only of a single bale or a large number of bales, sent their orders for black twill No. 2051, without referring either to the

plaintiffs' name or the serpent device, And there can be no doubt that what they expected to get when they gave that order was plaintiffs' black twill, because there was no other black twill on the market at that time bearing No. 2051 except the plaintiffs.

It has been suggested that purchasers must have associated the plaintiffs' name with the number. That in a sense is correct, but it does not mean that a shop-keeper on the frontier village, when asking for a bale of black twill No. 2051, was bound to have in his mind the personality of the plaintiff company. All he would require to have in his mind was that he bought this particular kind of cloth before with the plaintiffs' mark on it, and he wanted to have it again. If the purchaser has to be actually acquainted with the personality of the manufacturer, it is clear that manufacturers in the export trade would never have any chance of establishing their right to any particular trade-mark. It is obvious that the purchaser of a particular kind of cloth, bearing a particular device manufactured in Manchester, if he happens to be on the other side of the globe, will have no idea whatever of the manufacturer except as a person who has sent out the particular goods which he wants to buy.

There is no necessity for me to go through the evidence taken on commission at length, because the general effect of it is clear, namely, that these various dealers have shown and have produced in each case particulars of orders from their constituents, for this particular black twill, by the No. 2051. Nor it is necessary, as is usually argued in this class of cases, for the plaintiffs to prove that the purchaser has been deceived or will be deceived if he had both kinds of cloth placed before him. This would not, in any event, be the case when the actual purchase is made. It is sufficient if the Court is satisfied that a purchaser when wanting to buy the plaintiff's cloth may be misled into buying the defendants' cloth. Now the defendants say that they protect themselves by placing other marks totally different from the plaintiffs' marks on their twill. That would only be effective if they had proved that the purchasers knew the plaintiffs' goods by some other portion of the device than the number. That a practice exists

amongst the Bombay Mills of copying numbers appertaining to goods of rival mills which have attained a certain popularity in the market, is clear from the circular defendants have put in, which has been sent round by the Mill Owners Association to its various members. In that they refer to the objectionable practice current among mills of copying each other's numbers. And however much the defendants may protest that their multi-coloured ticket distinguishes their goods from the plaintiffs' so that there can be no possibility of deception, the fact remains, as I pointed out in the argument, that the defendants without any reason whatever—for none has been called to show why this number was assigned to their black twill—copied this number which the plaintiffs have been using since 1904. If there was no importance attached to the number, there was no possible reason why they should have fixed upon it rather than on any of the other hundreds and thousands of numbers, one of which they might have attached to this particular kind of twill. The only reason the Court can give for their having fixed upon this particular number, must be that the purchasers of this kind of cloth attached considerable importance to the number and bought the plaintiffs' cloth by that number, and the defendants thought, if they used this particular number, they might induce the purchasers to buy their cloth instead of the plaintiffs'. Their cloth is somewhat heavier and somewhat cheaper than the plaintiffs' cloth. Not content only with copying the No. 2051, they have also added the 10 which has nothing to do in their sense with colour. It has been suggested that it describes weight. That cannot be the case, because it has been proved that each piece of the defendants' cloth weighs from 11 3/4 to 12 lbs. Therefore it is quite clear that the defendants thought there was some magic in the 10 as well as in the 2051 which induced the purchasers to buy the plaintiffs' cloth. Again it may be said that if no importance was attached to the number, the defendants, when the plaintiffs gave them notice, could easily have changed the number of this particular kind of twill rather than run the risk of litigation, in order to defend their alleged right to use it.

Scott, C. J.—As to the main facts there is no dispute. They are concisely stated in the first paragraph of the judgment of the lower Court as follows :

"The plaintiffs are manufacturers of cloth which they manufacture in their Mill in Nagpur in the Central Provinces. In 1904 they commenced to manufacture a certain quality of black twill and for the purposes of reference they distinguished it from other kinds of cloth manufactured in the Mill by assigning to this twill No. 2051. The shade colour of the twill was distinguished by a series of numbers commencing from 1. The black twill was distinguished by No. 10. The number 2051 was in no way descriptive of the twill cloth. On each piece of cloth was also woven the device of a serpent surrounded by a scroll containing the name of the Empress Mill. This twill was put on the market in the North-West Frontier Provinces, Sindh and the Punjab where the plaintiffs have got their selling agents at Amritsar, Peshawar and Karachi. The dealers in these towns and other smaller towns would apply to the selling agents for the plaintiffs' cloth and the cloth would be distributed by these dealers to smaller dealers in smaller towns and villages and so on until it ultimately found its way to the consumer. In or about July 1913, the defendants, who were a company carrying on the manufacture of cloth in Bombay, put on the market a black twill cloth which was also marked "2051" with the number 10 below. In addition there was a printed ticket affixed to each piece, a sample of which was affixed to the piece of cloth manufactured by the defendants, put in as an exhibit in this case, and there was also a white ticket bearing the defendants' name and other particulars. The plaintiffs allege that by 1913 their black twill had become known amongst purchasers in Sindh, the Punjab and the Frontier Provinces by its number alone, so that anybody who wanted to buy the plaintiffs' black twill would not write an order "a bale of black twill from Nagpur Mill bearing the mark of the serpent and the number 2051, but would simply order "a bale of black twill No. 2051." "The plaintiffs contend that they have established this by their evidence and that they are therefore entitled solely to the use of that number on their black twill and that the use of that number by the defendants on a similar twill constitutes an infringement of their rights."

The learned Judge held that the No. 2051 was the dominant characteristic of the plaintiffs' goods among purchasers in the Indian markets in which it had an extensive sale, and that it was under this designation that the constituents of up-country middlemen were in the habit of ordering the plaintiffs' twill of that description ; and being of opinion that the defendants had copied the plaintiffs' number in order to induce purchasers to buy the defendant's cloth, which was rather heavier and cheaper than the plaintiffs', instead of the plaintiffs' cloth, passed the decree for an in-

junction and damages which is now under appeal.

The main contention of the appellants is that the learned Judge erred in assuming that purchasers ordering twill No. 2051 or 2051/10 expected to get the plaintiffs' particular manufacture bearing that mark and that on the evidence the plaintiffs had failed to prove that purchases of black twill No. 2051 or 2051/10 were made on account of special preference for the plaintiffs' particular cloth and that the number or combination of figures was merely a manufacturer's number or quality number, to which the defendants had as much right as the plaintiffs.

It will be convenient to deal with the question of quality numbers first. The argument that numbers on goods are merely manufacturers' quality numbers may be perfectly correct in a state of facts such as was proved to exist in *Barlow v. Gobindram* (1), relied upon by the appellants' Counsel, where the Court found that the same importers imported into India cloth of identically the same quality kind and measurement under different numbers as well as different object designs. But that contention is inappropriate where the cloth of a particular factory when of a particular kind invariably bears not only a trade device, but also a fancy combination of figures designed for that particular cloth. The number not only represents no other cloth, but that particular cloth never bears any other number—so that as far as quality is concerned (i. e., the ultimate result of the material and processes employed in that factory for the production of that cloth) there is no standard of comparison, but another piece of the same cloth of the same manufacture. The simple question, then in such circumstances is, whether the defendant in the passing-off case is doing something calculated to deceive purchasers into the belief that they are buying the particular article which they know as bearing the particular number. It is not a case of a known quality of one manufacturer indicated, for reasons of convenience, by various numbers, as in *Barlow v. Gobindram* (1) but of the particular mark in dispute being an invariable indication of the cloth of the plaintiffs' manufacture. It is however

1. (1897) 24 Cal 364.

contended that the plaintiffs cannot claim an exclusive right to the user of the particular combination of figures. unless it is shown that the purchasers consciously associate the figures with the plaintiff company. But where goods have acquired, by a particular fancy description, combination or device, a reputation in the market, it is immaterial that the customers do not know who the maker is. In *Wother- spoon v. Currie* (2) Lord Hatherley said:

"... The name of the article again, if it has acquired a name should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all—or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer."

So also Lord Halsbury in *Birmingham Vinegar Brewery Company v. Powell* (3) said :

"It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

The evidence appears to us to be convincing that the plaintiffs' twill cloth had by or before 1911 (the year in which the defendants claim to have introduced the marks complained of) acquired in the Northern India markets a reputation under the designation of 2051 and, when black, of 2051/10, and that purchasers desiring that cloth ordered it rather by those figures than by any other designation and that the figures had become by use the dominant designation. It is said that the witnesses for the plaintiffs were middlemen or commission agents and not the ultimate buyers and that the witnesses would not be deceived. To this the answer is that their testimony as to the form in which order for the plaintiffs, cloth is usually given is good proof of the association

formed in the minds of ultimate buyers between the figures and the article produced by the plaintiffs.

It is also contended that no case of actual deception has been proved, but this is not necessary. It is sufficient to justify relief if the Court is satisfied, as we are here, that the defendant is putting into the hands of middlemen a means whereby ultimate purchasers are likely to be defrauded : see *Singer Manufacturing Company v. Loog* (4) and *Lever v. Goodwin* (5). It has been contended that as the plaintiffs and defendants affix to their cloth distinctive trade marks no importance should be attached to the figures ; but it is a matter of common experience that the attention of buyers is often not attracted by the most prominent design. Experience alone shows which device has caught the attention of buyers. Here there can be no doubt that far more importance is attached to the figures than to the pictorial representations and the conclusion is almost irresistible that the defendants knowing the importance attached by buyers to the plaintiffs' combination of figures, adopted that combination in the hope of securing for their cloth some of the plaintiffs' customers.

In our opinion the judgment of the lower Court is right and should be affirmed. As regards the form of injunction objection has been raised as to its local extent, and as regards the form of the inquiry as to damages that it is sweeping. In our opinion the injunction must be wide enough to cover all possible Indian channels of approach to the ultimate buyers and should not be limited as contended by appellants, and as regards the form of inquiry as to damages it appears to us that it would be neither reasonable nor practicable to restrict the inquiry as suggested. The wide form of inquiry was adopted after argument in *Liver v. Goodwin* (5) and has been rightly applied in the present case. The appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

4. (1880) 18 Ch D 395.

5. (1887) 36 Ch D 1=57 L T 583.

2. (1872) 5 H L 508=42 L J Ch 130.

3. (1897) A C 710=66 L J Ch 763.

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BATCHELOR AND SHAH, JJ.

Dundappa Mallappa Sigandhi and others—Plaintiffs—Appellants.

v.

Secretary of State and others—Defendants—Respondents.

First Appeal No. 136 of 1913, Decided on 23rd February 1916.

(a) **Bombay District Police Act (1890), Ss. 42 and 44—Prohibition for all time throughout District of Vasantol procession is illegal.**

The Government of Bombay Resolution dated 6th May 1911 prohibiting Vasantol processions in the District of Belgaum for all time is illegal and ultra vires and is not covered either by S. 42 or by S. 44, Bombay District Police Act.

[P 189 C 1, 2]

(b) **Bombay District Police Act (1890), Ss. 42 and 44—Scope of—Prohibition cannot extend to whole district and aim of, is restoration of order and not prohibition of religious procession.**

Section 42, Bombay District Police Act expressly limits the powers of prohibition conferred upon the Magistrate both in time and in place, the limitation of place being to a particular town or village or the vicinity thereof. S. 44 (1), District Police Act, deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited.

[P 189 C 1]

(c) **Bombay District Police Act (1890), S. 13 (2)—Procession—Prohibition of, unlimited power is not conferred on government.**

Section 13 (2), District Police Act, does not confer any unlimited power on the Government to prohibit processions.

[P 190 C 2]

(d) **Public Road—Public have right to use.**

All members of the public have a right to use the public streets in a lawful manner, and it lies on them who would restrain them to show some law or custom abrogating the privilege.

[P 189 C 1]

Therefore the Lingayats of the District of Belgaum have a right to exhibit Vasantol, their religious symbol, in procession in any public street, subject to the lawful orders that may be passed under any provisions of law such as S. 144, Criminal P. C., or Ss. 42 and 44, Bombay District Police Act: 26 *Mad* 376 and 84 *Bom* 571, *Ref.*

[P 189 C 1, 2]

Strangman and S. R. Bakhale—for Appellants.*Jardine, S. S. Patkar, Bahadurji, G. K. Parekh and K. H. Kelkar*—for Respondents.*Batchelor, J.*—This appeal is brought by the plaintiffs in the suit. They sued as representatives of the Lingayat community of the town of Athni, and the object of their suit was to obtain a declaration of their right to exhibit in public their religious emblem known as the Vasantol.

The learned District Judge has decided against them because he has upheld the validity of a certain contested order of Government, viz., Government Resolution, Judicial Department, No. 2568 of 6th May 1911.* Upon that point only

*Resolution.

The Lingayats of Athni in the Belgaum District pray for permission, under S. 44 (1), District Police Act (Bombay Act 4 of 1890), to parade the Vasantol procession through certain streets of the town of Athni on the occasion of the visit of their High Priest, the Swami of Chitaldurg. The procession is intended to do honour to him and to show the respect and reverence with which his followers regard him.

2. The main points requiring consideration under S. 44 (1), District Police Act (Bombay Act 4 of 1890) are: (a) whether any dispute or contention exists which is likely to lead to a grave disturbance of the peace; and (b) what order would be proper having regard to the apparent legal rights and the established practice of the parties.

3. As to (a) there can be no doubt, on the evidence produced and from the past history of nearly a century, that a dispute has always existed and does now exist about the right to parade the Vasantol procession, both in Belgaum and in other districts. Similarly the same evidence shows that disturbances of the peace have in the past been caused by this procession, which has been described as "an obnoxious ceremony" and "an unbecoming procession." The element of disturbance is in the symbol of the great Vyasa's hands represented as cut off, and paraded in that manner. Though the Vaishnavite Brahmans are the class who consider themselves most directly aggrieved, there is no doubt that Vyasa has been held in the highest respect and is considered to be a God by those Brahmans who are followers of Shiva, and by the non-Lingayat Hindus generally. These last though they may not voluntarily and actively lead any opposition, would certainly sympathise with an agitation against the processions. The Governor-in-Council is therefore convinced that the dispute that exists is such as to raise a reasonable apprehension of a grave disturbance of the peace. The fact that the District Magistrate, Belgaum, ordered a special party of police to attend at Athni shows that in his opinion the occurrence of a riot was not improbable.

4. As regards (b) the Governor-in-Council is of opinion that there can be no legal right to parade through the streets with this symbol. He agrees with the Commissioner, S. D., that the Vasantol is not a necessary part of religious worship. The objection of the Brahmans and others is not to the procession itself, but to the parading of the Vasantol. On the question of the established practice, which after all is the most important one, it is admitted not only that there have been no processions of the kind in the Belgaum District within the memory of the present generation but that it has been prohibited whenever the Lingayats attempted to revive it.

5. The Governor-in-Council for these reasons is pleased to direct that permission should not in future be given to hold Vasantol processions in the Belgaum District.

the plaintiffs failed in the trial Court, and that point only is the subject for our decision in this appeal. Now the proposition with which we start, in a consideration of this subject, is the well-known principle that all members of the public and every sect have a right to use the streets in a lawful manner, and it lies on those who would restrain them in its exercise to show some law or custom having the force of law depriving them of the privilege: see *Sadagopachariar v. Rama Rao* (1), which was followed by a Bench of this Court in *Baslingappa v. Dharmappa* (2). These general or Common law rights may be restricted by Statute: in this instance by the Bombay District Police Act. But the restrictions imposed must, it is manifest, be justified by the Act. The question therefore is whether the Government Resolution, which I have quoted, is justified under the District Police Act. For, it is admitted by the learned Advocate-General that the Resolution is not to be saved by reference to S. 144, Criminal P. C., read with S. 38, District Police Act. The learned District Judge, commenting upon the terms of the Resolution, observes that the order is not drafted with legal precision and does not suggest that legal advice was taken. The want of precision to which the Judge here alluded adds some difficulty to our task. But the question is, whether, without pressing technicalities, the substantial requirements of the District Police Act have been complied with. In my opinion, the answer is in the negative. The authority issuing the order ascribes it to S. 44, sub-S. 1. That ascription however is, I think I may say, obviously a mistake. For whereas the resolution under notice purports to prohibit this Vyasantol procession, S. 44 (1) deals not with the prohibition of religious ceremonials, but with the maintaining of public order at religious ceremonials which are not prohibited. That notwithstanding, the resolution may, of course, still be valid if it can be attributed to powers vested in the Government by any other sections of the Act, and the only section to which recourse has been had for this purpose is S. 42.

That section also, in my opinion, fails to serve the turn of the respondents.

1. (1903) 26 Mad 376.

2. (1910) 34 Bom 571=7 I C 663.

For, in the first place, the authority empowered under S. 42 is not the Government, but the local Magistrate of the District, and the words "whenever and for such time as it shall appear necessary" appear to me in the context to mean "appear necessary to that Magistrate." It was suggested that the powers thus vested in the District Magistrate might be capable of legal exercise by the Government by reason of the provisions of S. 50 read with S. 13, sub-S. 2 of the Act. It is not at present necessary to pronounce upon this argument, and I will only say that I am doubtful whether it should be conceded. Assuming however that the argument is sound, it goes no further than this that the present orders, though issued by Government, have the same validity as if they had been issued by the District Magistrate. The question therefore is whether these orders, if issued by the District Magistrate, would be lawful orders under S. 42. I think they would not. For S. 42 enables the Magistrate to issue these orders only whenever and for such time as it shall appear necessary and the orders are to operate only in such town or village or the vicinity thereof as may be directed; in other words, the powers of prohibition conferred upon the Magistrate are by the Statute expressly limited both in time and in place, the limitation of place being to a particular town or village or the vicinity thereof. This particular order, as I understand it, is to operate for all time, and instead of being limited to any town or village or the vicinity thereof is to prevail throughout the whole of the Belgaum District.

On these grounds therefore I think that the Resolution in question is beyond the powers conferred by the Act.

The learned Advocate-General, as a last effort to sustain the resolution, suggested that it might be upheld if it were regarded as being nugatory. I am unable however to read it in that sense. From what I have already said, it is manifest that we must attend not so much to the words as to the plain meaning of this resolution, and of the meaning of it I have not been able to entertain any doubt. As I read the resolution, its meaning and effect is, and was intended to be, the prohibition of the Vyasantol procession throughout the Belgaum

District for all time. For the reasons which I have given I am of opinion that no such orders could lawfully be issued under the Bombay District Police Act. Therefore the point upon which the judgment of the Court below has gone against the appellants must now be decided in their favour, the decree of the District Judge must be reversed and the suit must be remanded to his Court to be heard and decided on the other issues. Costs to be costs in the suit.

Shah, J — This appeal arises out of a suit brought by the Lingayat plaintiffs in the District Court of Belgaum, for a declaration that the Lingayats have a right to exhibit Vyasantol, their religious symbol, in procession on religious and other occasions, and that the Government Resolution No. 2658 (Judicial Department) of 6th May 1911 is illegal and ultra vires in so far as it forbids the exhibition of the symbol entirely for all time and throughout the District. Among other things, it was urged by way of defence that the validity of the Government Resolution could not be questioned in a civil Court. The material issues were decided by the lower Court against the plaintiffs, principally on the ground that the Government Resolution was within the powers conferred by the District Police Act (Bombay Act 4 of 1890) on the Government, and that its validity could not be questioned in a civil Court except so far as S. 81 of the act permitted it. The result was that the plaintiff's suit was dismissed with costs.

In this appeal against the decree of the District Court, the only point argued is whether the Government Resolution of 6th May 1911 is illegal and ultra vires.

At the outset it will be convenient to deal with the point, which has been raised by the learned Advocate General, that the resolution does not prohibit anything and is merely a direction to the District Magistrate that permission should not be given in future to hold Vyasantol processions in the Belgaum District. Taking the resolution as a whole, I have no doubt that it was intended to prohibit, and has clearly the effect of prohibiting, Vyasantol processions in the District of Belgaum without any limitation as to time, so far as the Government are concerned. The resolution cannot therefore be treated

as merely nugatory as suggested by the Advocate General. As regards the validity of the resolution, it is conceded, and in my opinion rightly conceded, by the Advocate General that S. 38, District Police Act has no application to the present case. No reliance was placed on behalf of the defendants on S. 81 of the Act in the course of the argument; and it is clear that the section can have no application, unless the order contained in the resolution is made by the Government under an authority conferred by the Act.

The question therefore arises, whether the order in dispute can be referred to any authority conferred by the District Police Act on the Government. It is argued that the requisite authority is conferred by S. 50 read with S. 13, Cl. 2. Under S. 50 orders made by the Magistrate of the District under Chap. 4 are subject to the provisions of S. 13 (2); and S. 13, Cl. (2), provides that in exercising authority under the preceding sub-section the Magistrate of the District shall be governed by such orders as Government may from time to time make in this behalf. Assuming, without deciding that the Government have the power under S. 13 (2) of making such discretionary orders, as the District Magistrate is empowered to make under Ss. 42 and 44, so as to make them binding on the District Magistrate under S. 50, it is clear that the orders to be made must be justified under sections 42 and 44. If they transgress the provisions of Ss. 42 and 44, they would be ultra vires to that extent. S. 13, Cl. (2) does not confer any unlimited power on the Government to prohibit processions.

Having regard to the decisions in *Baslingappa v. Dharmappa* (2) and *Sadagoppchariar v. Rama Rao* (1), it is clear that the plaintiffs have a right to use the public streets in a lawful manner and it lies on those who would restrain them to show some law or custom abrogating the privilege, and that subject to the lawful orders that may be passed under any provisions of law such as S. 144, Criminal P. C., or Ss. 42 and 44, District Police Act, they would be entitled to hold the vyasantol processions in any public street. As I have already pointed out, the Government by their Resolution prohibit the vyasantol processions in the whole District of Bel-

gaum, without any limit as to time. The prohibition, that S. 42, District Police Act, contemplates, is limited as to time and space. It provides that the Magistrate of the District may, whenever and for such time as it shall appear necessary, prohibit in a town or village or the vicinity thereof the exhibition of symbols, which, in the opinion of the Magistrate, may probably inflame religious animosity between different classes. The order of the Government is not confined to any town or village, but extends to the whole District, and it is not limited in any manner as to time. I feel clear that it is outside the ambit of S. 42.

Under S. 44, it is still more difficult to justify the order of the Government. Under that section, when it appears to the District Magistrate that a dispute exists which is likely to lead to grave disturbance of the peace, he can give such orders, with reference to any religious exhibition or procession, as to the conduct of the persons concerned towards each other and towards the public as he shall deem necessary and reasonable under the circumstances. Such orders apparently are to have operation in a particular town or place. The present order of the Government does not appear to me to fall within the scope of S. 44, as it involves an unqualified prohibition of the vasantol processions in the whole District, and pays no regard to the apparent legal rights of the persons interested. Further, under S. 44 (2), any order made under S. 44 (1) is subject to a decree of a competent Court and is liable to be recalled or altered if it is inconsistent with a decree that may be passed in a suit, filed by an interested person, as to the rights and duties of the persons affected by the order. This subsection would save the present suit even if the order of the Government were within the scope of S. 44 (1), because no order made under para. 1 is to be inconsistent with the legal rights of the parties as determined by a Court of competent jurisdiction. But, in my opinion, the order of the Government is clearly outside the scope of Ss. 42 and 44; and it is not possible to treat it as having been made under an authority conferred by the Act. I am unable to agree with the learned District Judge in his opinion that :

"It is within the competence of Government in the exercise of their power of control to give a general direction to the District Magistrate."

No authority has been cited in support of this view, and on the proper construction of the sections of the Act, I cannot hold that the Act confers upon the Government an unlimited power of prohibiting religious processions in the whole of any District. On these grounds I am of opinion that the Government Resolution is illegal and ultra vires in so far as it prohibits the vasantol processions in the whole District without any limit as to time, and that it is no bar to the plaintiffs' suit. I therefore concur in the order proposed by my learned brother.

G.P./R.K.

Appeal allowed.

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BEAMAN AND HEATON, JJ.

Sardarkhan Jaridhkhan — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 265 of 1916. Decided on 24th August 1916, from conviction and sentence of Sess. Judge, Ahmedabad.

Penal Code (45 of 1860), Ss. 300 (3), 302 and 304—Death caused by single blow—Possibility is that the blow exceeded the effect that was in view so offence is culpable homicide not amounting to murder and not murder.

Where death is caused by a single blow, struck under the influence of passion, it must always be a nice and difficult question to determine the precise intention of the offender and it might not unreasonably be brought in some cases within the lesser offence of culpable homicide not amounting to murder. Every case must however be dealt with on its own facts, and loose applications of such inferential processes, giving too liberal an extension to the provisions of S. 300, Cl. (3), should not ordinarily be encouraged. [P 192 C 1, 2]

Deceased threatened accused, who lost his temper and rushing out brought an iron-shod stick with a single blow of which he killed the former.

Held: that, having regard to the fact that death was caused by a single blow, it was possible that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it, and that therefore the accused should be convicted of culpable homicide not amounting to murder under the second part of S. 304, I. P. C., and not of murder. [P 192 C 2]

G. N. Thakor—for Appellant.

S. S. Patkar—for the Crown.

Judgment.—The accused's father had a quarrel with the deceased, as a result

of which the deceased was discharged from the mill. The evidence is that he entered the mill after this and threatened the accused, who is a young man of about seventeen or eighteen. The accused appears to have lost his temper, rushed out and brought two sticks one of which he gave to accused 2, who is seven years older than accused 1 and who resides with him and his father. Accused 1 and 2 immediately went out with the object of driving the deceased off the mill premises, as they say, or, as is implied in the finding of the learned Sessions Judge assaulting him. Unfortunately, the two accused came upon the deceased sitting with his back towards them just outside the weaving shed, and the evidence is that the accused, being armed with a stick about three feet long having iron rings and about an inch in diameter, suddenly struck the deceased a violent blow on the back of the head which, as the medical evidence shows, resulted in death within a few hours. Mr. Thakor on behalf of the accused has not disputed the substantial fact of the killing, though he has pressed upon us a consideration of the possibility at least of the fatal blow having been struck by accused 2. We do not see any reason to doubt the correctness of the conclusion reached by the learned Sessions Judge upon this point.

We have therefore only to consider whether the killing in such circumstances amounts to murder or can be reduced to the lesser offence of culpable homicide not amounting to murder. If murder it can only be so under Cl. 3, S. 300, which enacts that

"Culpable homicide is murder if the death is caused by an act done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

Now where death is caused by a single blow, as is the case here, struck probably under the influence of passion, it must always be a nice and difficult question to determine the precise intention of the offender. Doubtless the learned Sessions Judge has followed what in a majority of cases, we think, we must concede the right and logical course. He has inferred the intention, that is to say, from the extent of the injury and the nature of the weapon used. On the other hand, where cases of this kind are

tried by Jury, Juries are much more disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object, if possible, of reducing the offence and so, notwithstanding the character of the injury and the nature of the weapon, imputing a lesser intention to the accused. Where, as we began by saying, death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended, particularly where the weapon used, although a very dangerous weapon, is one which is in the hands of so many people in that part of the country every day of their lives when they go about their ordinary field business. It is upon this ground—and upon this ground alone—that we are disposed to take a more lenient view of the offence committed by the accused than that which the learned Sessions Judge took. After all it must, in a case of this kind, be a matter of inference and nothing more, and while admitting that the inferential processes of the learned Judge are in accordance with what we conceive to be the common and best mode of administering this branch of criminal justice, there may be exceptional cases and exceptional circumstances which would warrant us, sitting here as Judges of final appeal, in taking what we have said might be a Jury's rather than a Judge's point of view. And if looking at the case thus, we feel that it might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, while even in the opinion of the Sessions Judge the actual degree of criminality belongs more properly to that than to the offence of murder, we do not think that we are really stretching the law at all by adopting a less strict mode of inferential reasoning. We feel that this is a case in which the sentence of transportation for life would, in any event, be out of proportion to the real criminality of the accused's act.

That being so, we find the less difficulty in coming to the conclusion that it is possible the blow he struck exceeded in violence the injury he had in view at the moment of striking it. His mind could not have been very clear, and it is hard to say that he could have had any definite intention of any kind at the

moment. But in saying this, we do not wish to encourage loose application of such inferential processes giving too liberal an extension to the provisions of S. 300, Cl. (3). Every case must be dealt with on its own facts, and this case is, we think, one which will allow us so far to agree with the learned pleader of the prisoner as to hold that the killing here can properly and legally be brought under S. 304 rather than S. 302.

We shall therefore alter the conviction from murder to culpable homicide not amounting to murder under the second part of S. 304 and direct that the prisoner be sentenced to five years rigorous imprisonment.

G.P./R.K.

Order accordingly.

A. I. R. 1916 Bombay 193

MACLEOD, J.

Wilfred R. Padgett—Plaintiff.

v.

Jamsetji Hormusji Chothia—Defendant.

Original Civil Suit No. 1437 of 1915,
Decided on 31st January 1916.

(a) Debtor and creditor—Interest—Suspension of, due to state of war—Rule as to, laid down—Interest—Contract.

The existence of a state of war between the respective countries of the debtor and creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt. [P 194 C 1]

The accrual of interest is suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its ensuring for the benefit of the enemy during the continuance of hostilities. [P 195 C 2]

(b) Emergency Legislation Continuance Act (1 of 1915)—Ordinances under S. 23 of Indian Councils Act remain in force during war and six months after.

Under Act 1 of 1915 the provisions of the various ordinances made by the Governor-General under S. 23, Indian Councils Act of 1861, have effect as if they had been enacted by the Governor-General in Council and remain in force during the continuance of the present war and six months thereafter. [P 195 C 2]

Campbell—for Plaintiff.

Inverarity—for Defendant.

Judgment—(25th January 1916)—Between 2nd April 1913 and 14th August 1913 the defendant signed five promissory notes for various amounts payable on demand with interest at six per cent. in favour of Messrs. Bume and Reif. Deducting various payments made from time to time there remained due for prin-

cipal and interest, when the suit was filed, Rs. 15,017-8-11. When war broke out between Great Britain and Austria the firm of Bume and Reif became a hostile firm. On 9th February 1915 a license was granted to the firm of Bume and Reif on the application of W. R. Padgett, Assistant Manager of the firm, under the Hostile Foreigners Trading order to carry on business under certain conditions. The license was to remain in force until 14th August 1915. On 15th August 1915 a fresh license was granted to the firm for the purpose of winding up their business which expired on 14th November and on 17th January 1916 it was notified in the Gazette that an extension after that date had been refused. But on 24th November 1915 a license was issued to Mr. Padgett with the previous authority of the Controller but not otherwise to bring, institute, defend, compromise or refer to arbitration any action, suit or other legal proceeding relating to the property, credits or effects of the said firm. The license was to continue in force until 31st January 1916.

Mr. Padgett accordingly filed this suit on 17th December 1915 as Liquidator of Bume and Reif with the consent of the Controller. The claim is admitted, but it has been contended that the plaintiff cannot maintain the suit and that the license giving him leave to take legal proceedings against the debtors of the firm is ultra vires. In my opinion the license, as granted to the plaintiff, was within the powers of the Governor-General acting under the provisions of the Hostile Foreigners Trading order. Then it was contended that the defendant was not liable to pay interest which was recoverable as damages, from the date of the outbreak of war until a license to trade had been issued. This raises a novel point. The Common law of England must be applied, but there is no direct authority which lays down what is the Common law. In *Du'Belloy v. Lord Waterpark* (1) the plaintiff sued on a promissory note signed in Paris on 27th December 1787 payable six months after date. The defendant pleaded limitation but there was no evidence that the plaintiff had been in England since the making of the note. The Jury asked whether they

1. (1882) 1 D & R 16=24 R R 628.

were bound to give the plaintiff interest as well as principal, and the learned Judge charged them that interest being the damage for the detention of the debt the question was peculiarly for their consideration. The Jury gave a verdict for the principal only. A rule was moved for to show cause why the verdict should not be increased but the Court held that the question of interest had been rightly left to the Jury. Abbott, C. J. concluded:

"But there is another objection to the plaintiff's recovering interest on the date, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy."

If this view is correct, it seems that the question of allowing interest during the period of hostilities ought not to have been left to the Jury. I have been referred to several American cases on the point and though these are not to be considered as authoritative, I may refer to the principal which can be extracted from them to ascertain whether it is so consonant with the dictates of common sense that I may safely assume that it agrees with the Common Law of England. The result of these American cases may be stated as follows: The existence of a state of war between the respective countries of the debtor and creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt. So limited, the reason of the rule is obvious, that a party should not be called upon to pay damages for retaining money which it was his duty to withhold and not to pay it over. It is essential to the application of the rule suspending interest when the respective countries of the debtor and creditor are engaged in war that the circumstances be actually such that the payment of the debt was made impracticable, if not impossible. Thus interest is not suspended in cases where the creditor although a subject of the enemy, remains in the country of the debtor or has a known agent there authorized to receive the debt. The first proposition I accept, but I should like to hear further arguments on the question whether or not interest was suspended, as this

firm remained in Bombay, until the firm was granted a license to trade or until the plaintiff was granted the license under which the suit was filed.

Final judgment.—I have now taken further evidence regarding the status of the firm of Bume and Reif and have heard further argument on the question of suspension of payment of interest. It appears that the partners in the firm of Bume and Reif were Mr. Bume and Mr. Reif, both Austrians, but Mr. Reif was naturalised British subject. The head office was Bradford in Yorkshire. There were branches at Hamburg, Bombay and other places. But the expenses of the Bombay branch were debited to the account of the Hamburg branch and it seems as if the Bombay branch was really an offshoot of the Hamburg branch. The outbreak of war between Great Britain and Austria dissolved the partnership, and on 24th October 1914 Mr. Reif was granted a license by the Secretary of State under the proclamation of 9th September 1914. Meanwhile Mr. Liebel, an Austrian who was in charge of the branch at Bombay, was interned. There can be little doubt that at the outbreak of war the firm was a hostile firm within the definition contained in Cl. 2 of the Hostile Foreigners Trading Order.

According to the original Common Law doctrine an alien enemy had no rights at all and commercial intercourse with alien enemies was illegal. On to this plain and obvious doctrine there were grafted by custom various exceptions. For instance, an alien enemy was not to be considered as an alien enemy unless he was residing in enemy territory. The proclamation of 5th August 1914 with regard to trading with the enemy, published in India on 7th August 1914, only forbade commercial intercourse with persons resident, carrying on business in or being in the German Empire and it was expressly stated that the proclamation did not apply to trading or commercial intercourse carried on by such persons solely from the branches of business which they might have in some other country including the British Dominions.

An explanatory announcement as to this proclamation was issued by the Treasury on 22nd August. It stated that as a rule there was no objection to Bri-

tish firms trading with German or Austrian firms established in neutral or British territory, what was prohibited was trading with any firm established in hostile territory. If a firm with headquarters in hostile territory had a branch in neutral or British territory, trade with the branch was permissible as long as it was bona fide and no transaction with the head office was involved. There was no objection to making payments to firms established in hostile territory on contracts entered into before the war broke out, when nothing remained to be done save to pay for goods already delivered or for services already rendered. The explanation was issued in order to promote confidence and certainty in British commercial transactions. The proclamation was revoked by the proclamation of 9th September 1914, which was not published in India until 31st October. The expression "enemy" was defined as meaning any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but it did not include persons of enemy nationality neither resident nor carrying on business in the enemy country. Under Cl. 5 the payment of any sum of money to or for the benefit of an enemy was prohibited. By Cl. 6 it was provided that when an enemy had a branch locally situated in British, allied or neutral territory, at any neutral territory situated in Europe, transactions by or with such branch should not be treated as transactions by or with an enemy. It was held in *W. Wolf & Sons v. Carr. Parker & Co. Ltd.* (2) that this clause referred only to new transactions. Now it may be that if the defendant had paid in the money due on the promissory notes to the firm in Bombay he would not have been doing anything which involved a penalty, but I think he was entitled to say :

"I am not going to do anything which may enure for the benefit of the enemy and I am not going to pay what I owe, until I am satisfied that the money which I pay will be retained in safe custody until the cessation of hostilities."

That was his duty as a good citizen, whatever might be permissible under proclamations of Government. It ought not to have needed the experience gained in the present war to make it obvious that trading with an enemy wherever

he may be resident of carrying on business must almost certainly benefit the enemy country, and although individuals may suffer the common good must be paramount. It would certainly be strange if I were to mulct a man in damages because he failed to assist the enemy, while it would be contrary to reason that he should continue to profit by the money or goods which he received in times of peace when Government had provided the means where by the debt could be paid without assisting the enemy. Therefore I think that the right principle to lay down is that the accrual of interest is suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities. As Mr. Inverarity contended that Various Ordinances made by the Governor-General under S. 23, Councils Act of 1861 were limited to expire within the period of six months from their promulgation, it seems necessary to point out that under Act 1 of 1915, the provisions of the said Ordinances have effect as if they had been enacted by the Governor-General in Council and remain in force during the continuance of the present war and six months thereafter. It was also contended that the license granted to the plaintiff expired on 31st January 1916 and that therefore he was not entitled to obtain a decree. That may be so ; but I understand that a renewal has been applied for and the decree can be drawn up when the new license is filed.

In my opinion therefore interest was suspended from 14th August 1914 until the defendant was notified that the license of 9th February 1915 had been granted; for under the terms of that license all moneys belonging to the firm and all moneys to be received thereafter were to be paid into the account of the Controller at the Bank of Bombay. It does not appear that any notice was given until this suit was filed and therefore interest will not begin to run again until 17th December 1915. The defendant must pay the plaintiff's costs except such as were incurred on the question whether interest was suspended and if so, for how long. That was a novel point

and each party will bear his own costs of that issue.

G.P./R.K. *Suit partly decreed.*

A. I. R. 1916 Bombay 196 (1)

BATCHELOR AND SHAH, JJ.

Municipality of Belgam—Plaintiffs—Applicants.

v.

Rudrappa Subrao Sutar and another—Defendants—Opposite Parties.

Civil Extra. Appln. No. 294 of 1915, Decided on 29th February of 1916, from decision of Asst. Judge, Belgaum, in Suit No. 32 of 1914.

Bombay District Municipalities Act (3 of 1901), S. 160 (3)—Revision.

An application for revision does not lie from the decision of a District Court under S. 160 (3). [P 961 C 1]

A. G. Desai—for Applicants.

T. R. Desai and K. H. Kelkar—for Opposite Parties.

Judgment.—In the case of *Chunilal Virchand v. Ahmedabad Municipality* (1) it has been decided by a Bench of this Court that no appeal lies from the decision of a District Court under Cl. (3), S. 160, Bombay District Municipalities Act. The object of this application is to obtain from the Court a decision that although no appeal would lie, yet an application in revision does lie. Such a decision would, in our opinion, be seriously anomalous, and we do not think that the words of the Statute require us to make such a pronouncement. The only decision which seems to us fairly consistent with that already recorded in *Chunil Virchand's* case (1) is the decision that no application for revision is competent. In *Balaji Sakharan v. Merwanji Nowroji* (2) this Court has held that it has no jurisdiction to revise the order of a District Judge acting under S. 23, Bombay District Municipalities Act of 1884. And although the words occurring in that section are "District Judge," whereas the words occurring in S. 160, last clause, are "District Court," we do not think that the distinction is sufficient to support the argument that an application for revision is competent, although admittedly no appeal would lie. The Rule therefore must, in our opinion, be discharged with costs. There will be one set of costs. We notice that the order in this case

was made not by the District Judge but by the Assistant Judge. As however no point has been taken on this circumstance, it is unnecessary for us to decide—and therefore we do not decide—whether the District Judge was competent under S. 16, Civil Court's Act, or otherwise to transfer to the Assistant Judge this particular case.

G.P./R.K. *Rule discharged.*

A. I. R. 1916 Bombay 196 (2)

BATCHELOR AND SHAH, JJ.

Shivbharan Ayodhyaprasad—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 120 of 1916, Decided on 13th July 1916, from conviction and sentence passed by a Bench of Magistrates, Second Class, Thana.

(a) **Penal Code (1860), S. 289—Essentials of offence.**

The essentials of an offence under S. 289 are that there should be probable danger to human life or limb or danger of grievous hurt from the negligence shown in the custody of the animal. [P 196 C 2]

(b) **Penal Code (1860), S. 289—Person allowing vicious animal to be at large is presumed to know of danger to human life.**

If a person allows an animal in his custody to be at large in spite of its previous vicious character, the presumption is that he does so with knowledge that there is probable danger to human life or limb. [P 197 C 1]

D. W. Pilgaonkar—for Applicant.

Judgment.—The applicant here has been convicted under S. 289, I. P. C., in that he negligently omitted to take such order with a bull in his possession as was sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from the animal. Mr. Pilgaonkar has contended, and we think rightly, that the essential ingredient of this offence is that there should be probable danger to human life or limb from the negligence shown in the custody of the animal. That is the point upon which S. 289 turns, and that is the point to which Magistrates in administering this section should devote their attention. We are not clear that the point received sufficient attention in this case, where the evidence goes to show no more than that the applicant's bull had on previous occasions fought with the complainant's bull. But in view of this evidence and the other circumstances on the record,

1. (1912) 36 Bom 47=12 I C 540.

2. (1897) 21 Bom 279.

we think it right in this particular case to draw for ourselves the inference that the applicant, in allowing this bull to be at large in spite of its previous character, did so with knowledge that there was probable danger to human life or limb. Therefore we discharge the rule.

G.P./R.K.

*Rule discharged.***A. I. R. 1916 Bombay 197**

BATCHELOR, AG. C.J. AND SHAH, J.

Baslingappa Virbhadrappa Huddar and others—Defendants—Appellants.

v.

Chandrappa Basawantrao Desai and others—Plaintiffs—Respondents.

Cross-Appeals Nos. 566 and 569 of 1914, Decided on 2nd August 1916, from decision of Asstt. Judge, Belgaum, in Appeal No. 66 of 1912.

(a) **Grant—Resumption—Grant for services rendered and to be rendered—Services not required or discontinued — Grantor is not entitled to resume—Grant deed not produced—Evidence merely showing that grant was for services — Land is presumed to be not resumable.**

Where a grant of land is made for services rendered and to be rendered, the grantor is not entitled to resume either on the discontinuance of the services or of his no longer requiring them to be performed. Where however the grant is made as remuneration for or in lieu of wages or service, the land would be resumable on the discontinuance of the service. Where the deed of grant is not produced and the only evidence as to its nature goes no further than that the grant was made for services, the presumption is that those services were services rendered in the past and to be rendered in the future and that the land is not therefore resumable. [P 197 C 2]

(b) **Grant—Resumption—Burden of proof.**

The burden of proving that the land is resumable lies on the party seeking to resume : 28 Bom. 305 ; 13 M. I. A. 438 (P.C.), and A. I. R. 1915 Bom. 96, Ref. [P 197 C 2]

*Jayakar and Jayant G. Rele—*for Appellants.

*Strangman and M. Nilkant Atmaram—*for Respondents.

Batchelor, Ag. C.J.—The plaintiffs are the Vatandar Desai Inamdars of Tallur in the Belgaum District, and they brought this suit, as the transcript of the plaint sets out, to recover possession of certain lands from the defendants on the footing that those lands had been, by the plaintiffs' ancestors, granted to the defendants' ancestors for the performance of certain services, which services the plaintiffs no longer required of the defendants. It was stated in the plaint that

"the services not being required in the present times, and the lands being resumable, the plaintiffs are entitled to recover them."

And it was then set forth that a notice to quit was served on the head of the defendants' family and that the defendants had refused to surrender. Therefore this suit was brought. The present appeal is by the defendants, whose ancestors were grantees of the lands in suit from the plaintiffs' ancestors. The main question involved in the appeal is whether, assuming that the lands were granted in respect of services, they are resumable merely by reason of the fact that the services are no longer rendered because no longer required. The decision of this question appears to turn on the character of the services for which the grant was made, and a distinction has to be drawn between a grant made for services rendered and to be rendered, and a grant made as remuneration for or in lieu of wages or service. In the case of this latter grant, and not in the case of the former grant, the lands would be resumable on the discontinuance of the service. But the burden of proving that the case falls within the category of lands resumable on the discontinuance of service plainly falls upon the plaintiff who seeks to resume them : see the decisions of this Court in *Lakhamagavda Basaprabhu v. Keshav Annaji Kulkarni* (1), which followed the Privy Council judgment in *Alexandar John Forbes v. Meer Mahomed Tuqee* (2) and *Yellava Sakreppa Barki v. Bhimappa Gireppa Desai* (3).

Now the plaintiffs in this case must, in my opinion, fail because they failed to show that the grant made by them or their ancestors was a grant on terms that the lands should be resumable if the services ceased. In truth we know nothing whatever of the terms of the grant upon this vital point. The grant itself is not forthcoming, and the fragmentary evidence as to its nature goes no further than this, that the grant was made for services. The presumption would be that those services were services rendered in the past and to be rendered in the future, and there is nothing in the evidence to repel that presumption or to establish the case which it is necessary for the plaintiffs

1. (1904) 28 Bom 305.

2. (1869-70) 13 M I A 438 (P C).

3. A I R 1915 Bom 96=39 Bom 68=28 I C 12.

to establish. The learned Assistant Judge says that he is satisfied "that this land was granted by the Desais for future service." It is clear however that there is no evidence to support this finding, if it is to be read in the full rigour of the words; for the only documents upon which the plaintiffs relied in this connexion were Exs. 20-A and 56, which go no further than to show that the defendants' ancestors held as *nisbatdars* under the plaintiffs' ancestors. That phrase however would only mean that the defendants' ancestors held either in relation to or under the plaintiffs, and that would be perfectly consistent with the case which the defendants now made. Since the plaintiffs are unable to show that the grant was such that the lands became resumable on the discontinuance of the service the appellants-defendants must on this point succeed.

But then it was contended by Mr. Strangman that his clients, the plaintiffs, are entitled to judgment inasmuch as they were the defendants' lessors, and the defendants, prior to the institution of this suit, denied their title. Therefore, it is argued, a forfeiture of the holding has been incurred. Assuming for the purposes of the argument that plaintiffs may be correctly described as the defendants' lessors, I am yet of opinion that the plaintiffs cannot save their position upon this ground. For, first, it is in my judgment clear that the whole suit up to this Court of second appeal has been fought out between the parties without reference to any such claim as this. As I understand the judgment and proceedings in the Court below, the plaintiffs' claim to recover the land was grounded only on this, that the grant was for service and the service had been discontinued. I can find nothing to warrant the idea that up till this moment the defendants ever had a fair opportunity of meeting the case that they must surrender the land because they have denied the plaintiffs' title. That being so it is unnecessary to consider whether, if they had to meet such a case, they would be able to meet it successfully. But we have allowed Mr. Jayakar, to discuss before us the documents upon which the case for the plaintiffs upon this point was mainly rested, and I am satisfied that in these documents there is no such repudiation

of the plaintiffs' title as would work a forfeiture of the holding. These being the only points mentioned in the argument, I am of opinion that the appeal must be allowed and the plaintiffs' suit must be dismissed. It should be mentioned that although in the pleadings the defendants have, as is usual in the *moffusil*, overstated their case, and claimed that they were entitled to hold the land without rendering service, they now undertake through their Counsel, Mr. Jayakar, to perform the accustomed services, should they ever be asked to do so. In view of the fact that both sides have steadily overstated their real positions, we think that the proper order will be that each party should bear his own costs throughout.

Shah, J.—I agree.

G.P./R.K.

Appeal allowed.

A. I. R. 1916 Bombay 198

BACHELOR AND SHAH, JJ.

Gokaldas Motiram Surti—Plaintiff—Appellant.

v.

Partab Kabhai Barot—Defendant—Respondent.

Second Appeal No. 872 of 1914, Decided on 27th June 1916, from decision of Dist. Judge, Ahmadabad, in Appeal No. 215 of 1912.

(a) **Mahomedan Law — Pre-emption—Hindus of Godhra.**

The Hindus of Godhra are governed by the Mahomedan Law of pre-emption. [P 198 C 2]

(b) **Per-emption—Suit for—Right cannot be exercised in fractions.**

The right of pre-emption cannot be exercised in fractions and a suit to pre-empt a portion of the property sold cannot be maintained: 21 *All.* 292 and 19 *All* 466; *not Foll.*; 4 *Cal.* 1831 (*FB*), *Foll.* [P 199 C 1]

Ratanlal Ranchhoddas—for Appellant.

G. K. Parekh—for Respondent.

Judgment.—The house in suit belonged to one Damodar, whose neighbour on the north was defendant 1 and on the south the plaintiff. Damodar sold the house to defendant 1, who subsequently sold it to defendant 2. The parties are Hindus of Godhra. The plaintiff brought this suit on the footing that he was entitled to pre-empt one-half of the house, and therefore he prayed for possession of one half of it on payment of a sum of Rs. 462-8-0. It has been held by the lower Courts that Hindus in Godhra are governed by the

doctrine of pre-emption and that finding must now be accepted. The plaintiff's suit has been dismissed by the District Judge, as the learned Judge was of opinion that it was not lawful for one person to pre-empt a fraction of the property in controversy.

Mr. Ratanlal, who appears for the plaintiff in this appeal, has urged that the learned District Judge is wrong in this view of the Mahomedan Law of pre-emption, and in support of this contention has relied upon *Abdullah v. Amanatullah* (1), which followed *Amir Hasan v. Rahim Bakksh* (2). It cannot, we think, be denied that these judgments are in the plaintiff's favour nor can it, as we think, be denied that they are incapable of reconciliation with the Full Bench decision of the Calcutta High Court in *Lalla Nowbut Lall v. Lalla Jewan Lall* (3). We have therefore to choose between these two authorities, and in this predicament it seems to us safer to follow the ruling which commended itself to the Calcutta Full Bench. The parties here are, as we have said, Hindus to whom the Mahomedan doctrine of pre-emption applies rather derivatively than originally. Moreover the authorities show that in this Presidency it has not been the custom to enforce the doctrine of pre-emption to the extent allowed in Allahabad, and, as we venture to think, the enforcement of it to the extent of allowing the right of pre-emption to be exercised in fractions would be productive not only of serious practical inconvenience but in many instances of injustice, seeing that that the owner would frequently be compelled to sell his property at an under-value.

On these grounds it appears to us that the best course now open to us is to follow the principle adopted in *Lalla Nowbut Lall v. Lalla Jewan Lall* (3) and to confirm the decree of the District Judge dismissing this appeal.

Costs of it will be borne by the plaintiff.

G.P./R.K.

Appeal dismissed.

1. (1899) 21 All 292.

2. (1897) 19 All 466.

3. (1879) 4 Cal 831 (F B).

A. I. R. 1916 Bombay 199

BATCHELOR, AG. C. J. AND SHAH, J.

Chandabhai Janubhai and others—Defendants—Appellants.

v.

Ganpati Patilboa and others—Plaintiffs—Respondents.

Second Appeal No. 1012 of 1914, Decided on 24th August 1916, from decision of Dist. Judge, Ahmednagar, in Appeal No. 16 of 1914.

Dekkhan Agriculturists Relief Act (17 of 1879), Scope of S. 3 (z)—A suit though called a suit for redemption, but in fact a suit for setting aside a sale deed alleged to be fraudulent is outside the scope of S. 3 (z).

Plaintiffs' father mortgaged certain property to defendant 1, and after his death, plaintiffs being minors, their mother sold some of the mortgaged property to defendant 2. Plaintiffs sued to redeem the mortgaged property under S. 3 (z), Dekkhan Agriculturists' Relief Act, praying that the sale by their mother, being unlawful and unauthorized, was not binding upon them :

Held : that the suit, though called a suit for redemption, was primarily designed for the setting aside of the deed of sale alleged to be fraudulent, and could not therefore be brought within the scope of S. 3 (z) of the Act : 9 I C 393 (PC), *Foll.* [P 200 C 2]

*Jayakar and R. S. Navalkar—*for Appellants.

*A. G. Desai—*for Respondents.

Judgment.—This appeal which is brought by the original defendants must in our opinion, succeed, and as it succeeds upon a preliminary point, we make no pronouncement as to the merits of any part of the case. It is further to be observed that this preliminary point, upon which we are about to reverse the decree of the learned District Judge, goes to the root of this litigation, and to the jurisdiction of the Courts, so that we have felt bound to consider it. It will however be recognized that in allowing it to prevail, we are deciding the suit and the appeal upon a point which was not argued before the learned District Judge, and upon which the ruling authority was not cited to him.

The suit was filed by the plaintiffs under the Dekkhan Agriculturists' Relief Act as a suit for the redemption of mortgaged property within S. 3, Cl. (z), of the Act. The whole question is whether the suit, properly considered, can fall within this description. In our opinion a reference to the pleadings shows that it cannot. After reciting a mortgage by the plaintiffs' father, and al-

leging payments of vasul thereafter, the plaintiff in para. 3 goes on to say that defendant 1 with a view of fraudulently acquiring the lands of the plaintiffs obtained an out-and-out sale-deed from the plaintiffs' mother. In para. 4, the plaintiffs claim that that sale by their mother was unauthorized and was unlawful, and in this paragraph it is expressly said that the suit has been brought to get this deed cancelled. This is made equally clear in prayer A of the prayer clause, where we read the plaintiffs' prayers are as follows :

"That on deciding (that is to say, after deciding) that whatever transaction may have been entered into between defendant 3 and defendants 1 and 2 is not binding on the plaintiffs, it should be held that all the lands have become free from any mortgage charge."

It is manifest therefore that on the plaintiffs' own showing this was not a mere suit to redeem, but was a suit primarily for the setting aside of a fraudulent deed of sale, and that being done for the redemption of certain properties, including those released from the fraudulent sale. The difficulty of bringing such a suit within the description in Cl. (z), S. 3, Dekkhan Agriculturists' Relief Act, was noticed by the defendants, who in para. 13 of their written statements took the ground that the suit for redemption was not maintainable under the Act so long as the sale-deed was outstanding, and issue No. 2 framed in the Court of trial seems to have been designed to meet this particular dispute. Thereafter however the Court seems to have lost sight of the point, probably because it was not argued and the authority deciding it was not noticed. The authority deciding it is the Privy Council judgment in *Bachi v. Bhikchand Jiomal* (1). We need not set out the facts in that litigation. It is enough to say that the more the report is studied the more closely do the facts in *Bachi v. Bhikchand Jiomal* (1) appear to resemble those now before us. In the judgment Lord Macnaghten, after pointing out that the Dekkhan Agriculturists' Relief Act gave extraordinary relief in certain particular cases specified in the Act, observed that the only question was whether that suit was one in which special relief could be granted. His Lordship continues :

"In their Lordships' opinion it is not. In-

form it is a suit for redemption. In reality it is nothing of the kind. It is a suit to recover property of which the rightful owner has been deprived by fraud. That settles the case."

Every word of this judgment is strictly applicable to the facts of the present appeal. The suit, though called a suit for redemption, was primarily designed for the setting aside of the deed of sale alleged to be fraudulent. That, under the Privy Council ruling, is not the sort of case which can be brought within the special categories of the Dekkhan Agriculturists' Relief Act. On this preliminary ground we are of opinion that the appeal must be allowed, and that the suit must be dismissed. We have fully considered Mr. Desai's application that he should be allowed to amend his plaint, and convert the suit into a suit for redemption under the ordinary law. We think however in view of the course which the litigation has taken that it is not possible to accede to this application. For to grant it now would mean a new plaint followed by a new written statement and new issues. Much of the evidence on the record would be inadmissible by virtue of the exclusion of the Dekkhan Agriculturists' Relief Act, whereas a great deal of other fresh evidence would necessarily be introduced. We think therefore that our only course is to allow the appeal and dismiss the suit. We see no reason for departing from the ordinary rule as to costs, that is to say, the suit will be dismissed with costs throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1916 Bombay 200

BACHELOR AND SHAH, JJ.

Nabibhai Vazirbhai—Defendant—Applicant,

v.

Dayabhai Amulakh—Plaintiff—Opposite Party.

Civil Extra. Appln. No. 329 of 1915, Decided on 17th March 1916, against order of Sub-Judge, First Class, Ahmedabad, in Darkhast No. 75 of 1915.

Limitation Act (1908) Art. 117—Law of Limitation is "lex fori"—Application for execution of foreign decree must be made within time prescribed by British Indian Laws.

Suits and applications must be brought within the period prescribed by the local law of the country within which the suit or the application is brought.

Therefore an application for execution of a decree of a foreign Court transferred by that

1. (1911) 9 I C 393 (P O).

Court to a Court in British territory is barred by time, if the application is not within the period prescribed by the law in British India though it is within time according to the law in the foreign territory: 35 Bom 103 *Rel. on*, 15 Bom 28 *expl and dist.* [P 202 C 2]

Per *Shah, J.*—It is not for the foreign Court to consider whether the execution in British India would be time-barred; and the order for transmission by the foreign Court cannot be treated as an order for execution [P 202 C 1]

G. N. Thakor—for Applicant.

M. K. Metha—for Opposite Party.

Batchelor, J.—The present application is made by the judgment-debtor who was defendant 4 in the suit. The suit was filed by the plaintiffs to recover upon two documents, and the Court in which the suit was instituted was the Court of Kalol in the territories of His Highness the Gaekwar of Baroda. There a decree was passed in the plaintiffs' favour, and ultimately the plaintiffs applied that this decree should be transferred for execution to the Court of the Subordinate Judge of Ahmedabad. That transfer was accordingly made, and the *darkhast* has been heard by the learned Subordinate Judge of the first class. The only one of his findings with which we are now concerned is the finding that the execution of this decree is not barred by time. That finding is challenged by Mr. Thakor on behalf of the present applicant, and it seems to me that Mr. Thakor's contention must be allowed. There is some uncertainty as to what the law of limitation is in Baroda with regard to the execution of such decrees. But this much is agreed between the parties that the period of limitation is either six years or twelve years. Whether it is the one or the other is a matter of no moment. I will assume in favour of the opponent that it is six years. The decree was obtained on 11th December 1909. Admittedly the first application made for execution was not made till 1913. That application was therefore within time according to the law in Baroda. It was admittedly beyond time according to the law in British India, which prescribes a period of three years for such an application. Now suits and applications must be brought within the period prescribed by the local law of the country within which the suit or the application is brought, that is to say, it is the *lex fori* which governs.

That being so, this decree became, in

my opinion, incapable of execution in British India after the lapse of three years from the date the decree was made. And since the law to be applied is the law of British India, it is no answer to say that the decree was still alive and capable of execution in Baroda when the order was made transmitting it for execution to Ahmedabad. The learned Judge has, I think, misunderstood Sir Charles Sargent's decision in the case of *Husein Ahmad Kaka v. Saju Mahamad Sahid* (1), which he has construed as authority for the proposition that he had no power to determine whether execution was barred or not, being bound by the order of the transferring Baroda Court. That decision is of no authority in regard to a decree ordered for transmission by a foreign Court. The very ground of the decision is that there is outstanding an order of a competent Court binding the parties and directing the execution of the decree. No such order as this either was made, or could have been made, by the Baroda Court so as to bind the Ahmedabad Court or the parties litigating in that Court. It was therefore competent to, and obligatory upon, the learned Subordinate Judge to consider and determine this question of limitation. For the reasons which I have given and which are supported by this Court's decision in *Jeevandas Dhanji v. Ranchoddas Chaturbhai* (2), I am of opinion that this decree was incapable of execution in the Court of Ahmedabad being barred by time according to the British Law of Limitation which, in my view, governed the case. Therefore I would make the rule absolute and order that the *darkhast* be dismissed against the present applicant with costs here and in the Court below. The decision will govern also the similar application No. 330 of 1915.

Shah, J.—I am of the same opinion. The question is whether the application for execution made by the plaintiffs to the first class Subordinate Judge's Court at Ahmedabad is in time. The decree sought to be executed is a decree of the Court at Kalol in the Baroda territory and was passed in December 1909. The application for execution was made in 1915 after the decree was transferred

1. (1891) 15 Bom 28.

2. (1911) 35 Bom 103=8 I C 168.

by the foreign Court to the British Court for execution. It must be decided with reference to the law of limitation obtaining in British India; and it is clear that according to the provisions of the Indian Limitation Act, the application is beyond time. Even assuming, without deciding, that the applications made for the execution of the decree to the Court at Kalol could be treated as applications to the proper Court for execution within the meaning of Art. 182, Lim. Act, it is an admitted fact in this case that no application was made even to the Court at Kalol within three years from the date of the decree for execution. The application is therefore, clearly time-barred. I think that it was competent to the lower Court to determine the point of limitation, and that the order of the foreign Court transmitting the decree for execution did not and could not conclude the question. The decision in *Husein Ahmad Kaka v. Saju Mahamad Sahid* (1) has no application to the present case and is distinguishable on the grounds stated in the case of *Jeevandas Dhanji v. Ranchoddas Chaturbhai* (2). It is not for the foreign Court to consider whether the execution in British India would be time-barred; and the order for transmission by the foreign Court cannot be treated as an order for execution.

G.P./R.K. *Rule made absolute.*

A. I. R. 1916 Bombay 202 (1)

SCOTT, C. J. AND SHAH, J.

Balwantsing Ramchandra — Appellant.

v.

Sakharam Mancharam — Respondent.

First Appeal No. 54 of 1914, Decided on 10th September 1915.

Civil P. C. (1908), S. 97 — Combined appeal against preliminary and final decree is legal.

Section 97, does not prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so. [P 202 C 2]

Judgment.—This is an appeal against preliminary decree in a mortgage suit which was passed on 1st December 1913. All the accounts directed by that decree were taken and a final decree was passed on 9th February 1914. The appellant then, instead of appealing against the final decree, appealed on 19th February

1914 against the preliminary decree. Prima facie such a course appears quite unreasonable, but it is contended that it is justified by the provisions of the Civil Procedure Code, S. 97, which says that :

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

That section does not however in terms prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so. It appears to us that in this case the appellant or those who are acting on behalf of the appellant, who we are told is a minor, by filing this appeal have sought to take advantage of S. 97 of the Code in order to evade paying proper court-fees on appeal from a final decree. We will permit the appellant to have a reasonable time to combine such objections, if any, as he may have against the final decree in this appeal. Of course the court-fees, such as may be necessary, will have to be paid. We adjourn the case for two months.

G.P./R.K. *Case adjourned.*

A. I. R. 1916 Bombay 202 (2)

BATCHELOR AND SHAH, JJ.

Gurappa Shivgenappa Putti — Appellant.

v.

Tayawa Shidappa — Respondent.

First Appeal No. 31 of 1915, Decided on 6th March 1916, from decision of Assistant Judge, Belgaum, in Miscellaneous Application No. 7 of 1914.

Guardians and Wards Act (1890), S. 7 — Elaborate inquiry as to nature of property is outside scope of Act and decision of Court does not operate as res judicata — Order is to be made on consideration of minor's welfare.

Proceedings under S. 7, are summary and the order made by Court should be based on considerations of the minor's welfare. Elaborate inquiries as to the nature of the property left by the deceased are outside the scope of the Act and any decision that the Court may arrive at will not operate as res judicata. For the purposes of the Act, it is enough that the application is made on the footing and with the claim that the minor is separately entitled to separate property. The order appointing a guardian should be made on that footing, leaving it to him to institute suits on behalf of the minor for the recovery of the property which he claims.

[P 203 C 1, 2]

Jaykar and Nilkant Atmaram — for Appellant.

Coyaji and A. G. Desai — for Respondent.

Batchelor, J.— This is an appeal from a judgment of the learned Assistant Judge of Belgaum pronounced in an application made under S. 7, Guardians and Wards Act. The application was by the present appellant, who is the father of the minor concerned, a young widow named Savitribai, aged about 16 or 17. The application was that the appellant should be appointed guardian of her person and property.

The petition was made on the footing that certain property left on the death of the widow's husband's father, named Shidappa, was Shidappa's separate property. The opponents contended, on the other hand, that this property was joint property between Shidappa and his brother. The question therefore was raised in the lower Court whether the property was in fact the separate property of Shidappa or was joint family property, and the learned Judge below embarked upon a long and laborious inquiry upon this question. In the end he came to the conclusion adverse to the petitioner, holding that the property was joint. Consequently he refused to appoint the petitioner guardian of the property. In appealing against this decision counsel for the petitioner seeks to show that on the evidence the true conclusion should be that the property was separately owned by Shidappa. It appears to me however that there is an initial difficulty in the appellant's way, and that is that, in my opinion, elaborate inquiries of this nature are not contemplated to be made under S. 7, Guardians and Wards Act. That section, in my judgment, contemplates only a summary inquiry followed by an order made for the welfare of the minor. Another reason for holding that such an inquiry as this is outside the scope of the Guardians and Wards Act is that, despite the elaborateness of the inquiry made, it is admitted that the Court's decision, whatever it might be, would not operate as *res judicata*, so that the difficult questions agitated in such an inquiry as this would still have to be agitated again in a civil suit in order that finality of decision could be attained.

Mr. Jayakar for the appellant has

called our attention to the Full Bench decision in *Virupakshappa v. Nilganga* (1). But that case is not, I apprehend, of authority upon our present facts. For the facts upon which that case was decided were that the minor in question was admittedly a member of a joint Hindu family governed by the Mitakshara law, and therefore admittedly possessed of no separate property. Here it is otherwise. For the petitioner claims that the minor is not a member of a joint Hindu family and is entitled in her own right to the separate property owned exclusively by Shidappa. It is true that this position is contested on behalf of the opponents. But the question between them must, I think, be decided by a civil suit and ought not to be determined in summary proceedings under the Guardians and Wards Act. For the purposes of that Act it is, I think, enough that the petition is made on the footing and with the claim that the minor is separately entitled to separate property. Upon that footing, I think, we ought to appoint the petitioner the guardian of the property of the minor. It will then be for him on behalf of the infant to institute suits for the recovery of the property which he claims.

I would therefore reverse the finding and the order of the learned Assistant Judge and appoint the petitioner the guardian of the minor's property, without expressing any opinion as to whether the petitioner is right in claiming that the property belonged to Shidappa separately, or the opponents are right in maintaining the contrary. We have not overlooked that passage in the petition where the petitioner expresses his willingness that the Nazir may be appointed guardian of the property. But on the whole it appears to us more satisfactory that the petitioner himself should be appointed in that capacity. No costs here or in the Court below.

Shah, J.—I am of the same opinion.

G.P./R.K.

Order reversed.

A. I. R. 1916 Bombay 204

BACHELOR, AG. C. J. AND SHAH, J.

Ramchandra Dhondo Kulkarni —
Plaintiff—Appellant.

v.

Malkapa Narsapa Devare and others —
Defendants—Respondents.

Second Appeal No. 472 of 1914, Decided on 18th August 1916, from decision of Asstt. Judge, Belgaum, in Appeal No. 295 of 1910.

Civil P. C. (5 of 1908), S. 11—Res judicata—There must be some privity between the parties in the earlier and the later suits—Mortgagor has only equity of redemption—He does not represent mortgagee in a suit instituted after the mortgage—A decree in such a suit does not bind the mortgagee as res judicata.

The principle on which S. 11, Civil P. C., is based is that there must be some privity between the parties in the earlier and the later suit. A mortgagor, possessing only an equity of redemption, has not in him any such estate as would enable him sufficiently to represent the mortgagee in a suit instituted after the mortgage, and a decree passed in such a suit will not bind the mortgagee: 8 *All* 324; 4 *Cal* 693; 32 *Cal* 357 (PC); 13 *Bom LR* 268 and *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, (1894) 1 *Ch D* 578, *Ref.*

[P 205 C 1]

During defendant's minority his mother sold his land to B 1, who transferred it to B 2 and the latter mortgaged it to plaintiff. On attaining majority, defendant brought a suit against his mother, B 1, and B 2 to set aside the alienation by his mother. Plaintiff was not made a party to that suit. The suit was decreed and defendant got possession of the land. Subsequently, plaintiff brought a suit against B 2 on foot of his mortgage without impleading defendant as a party and, after obtaining a decree, bought the land in suit in execution of that decree. He then sued defendant for possession of the land. Defendant contended that the suit was res judicata, as plaintiff was bound by the decree obtained by defendant against B 2 whose mortgagee the plaintiff was:

Held: that the decree passed in the earlier suit did not bind the plaintiff, as his title arose prior to the institution of the suit, and he was not sufficiently represented in that suit by his mortgagor.

[P 205 C 1]

K. H. Kelkar—for Appellant.*A. G. Desai* and *Jayant G. Rele*—for Respondents.

Judgment.—The facts in this second appeal are somewhat complicated, but we propose to refer only to such of them as are necessary for the decision of the point with which we are now concerned. The original owner of this property was defendant 1 Devare. In 1883, during the minority of Devare, his mother purported to sell it to the Bhojes, from whom Bavchi, in 1890, received it in

exchange for another parcel of land. In 1891, by a simple mortgage Bavchi mortgaged the property to the present plaintiff, who is the appellant before us. In 1898, a suit was brought by Devare against his mother, Bavchi and the Bhojes, in order to set aside the sale by Devare's mother to the Bhojes. That suit was successful, and the result was that the sale to the Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavchi and the others. The property was put to sale and was purchased by the plaintiff with permission. But when the plaintiff proceeded to endeavour to get possession, he was resisted by Devare. Hence the present suit to recover possession. The only question now before us is whether, in spite of the result of Devare's suit of 1898, it is open to the plaintiff now to show, if he can show, that the alienation by Devare's mother to the Bhojes was good in law, as, for instance, it would be, if the plaintiff could succeed in proving that the sale was for recognized necessity. It is contended against the plaintiff that it is not open to him to lead evidence in this sense, for that he is bound by the decree against his mortgagor in 1898 by virtue of the provisions of S. 11, Civil P. C. It is admitted that all the provisions of that section imposing the application of the doctrine of res judicata are satisfied against the plaintiff, except the provision which requires that the former suit must have been either between the same parties, or between parties under whom they or any of them claim. Admittedly the suit of 1898 was not between the same parties. The question therefore is whether the present plaintiff can properly be said to be claiming under his mortgagor Bavchi.

The argument against him is that since he became the auction-purchaser in 1894, the title to the whole estate vests in him without reference to any original distinction as to his position as mortgagee; that since, at the time of this suit, he was the owner of the property, he in this suit must be held to be claiming under the former owner, namely, his mortgagor Bavchi. The answer, however, to this argument seems to us to be afforded by a rather closer consideration of the principle upon which S. 11 is based. As we understand it,

that principle is that there must be between the parties in the earlier and the later suit some privity. In the particular case before us that privity would be privity of estate: in other words, the principle comes into operation only if in the earlier litigation the estate in controversy was efficiently represented. That being so, we must consider how far this estate was efficiently represented by the mortgagor Bavchi at the time of Devare's suit in 1898. At that time the present plaintiff was a mere mortgagee, and Mahmood, J.'s decision in *Sita Ram v. Amir Begam* (1) is authority for the view that as a mere mortgagee the plaintiff would not be bound by the earlier decision, because his title arose prior to the suit in which the decree against his mortgagor was obtained and the mortgagor, possessing only the equity of redemption, had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage. So in *Bonomalee Nag v. Koylash Chunder Dey* (2) it was held that a mortgagee not in possession, suing for a declaration that a right of way did not exist, was not bound by a decision in a suit between the mortgagor and a third party of which he had no knowledge. The ground of the decision was that the mortgagor did not represent the entire estate. It is true that the learned Judges in this latter case reached their conclusion with some hesitation. But Mahmood, J., in his fully reasoned judgment in *Sita Ram v. Amir Begam* (1) succeeds, we think, in showing that the decision was based upon sound principle.

If that is so, and if, as Mahmood, J., said, adopting the words of the American text-writer, Bigelow, the ground of the privity is property and not the personal relation, then we do not understand how the present plaintiff is in any worse position merely because in 1904 he altered his original position of mortgagee to that of auction-purchaser. For, notwithstanding that alteration, the question would still be, not what was the plaintiff's position in 1904, but whether in 1898 the mortgagor possessed sufficient estate to represent and bind his mortgagee. Now at that time

the estate vested in the mortgagee and it seems to us difficult to hold that that estate was sufficiently represented in the absence of the party in whom in law it vested. It might, no doubt, be a different thing if the plaintiff's mortgage had been taken after the suit of 1898. But here the fact is that the plaintiff's title arose prior to the litigation in which the mortgagor was defeated. There are apparently no other decisions exactly in point, but *Joy Chandra Banerjee v. Sreenath Chatterjee* (3) and *Abdulali v. Miakhan* (4) may be referred to as cases of a simpler type where the decisions lend support to the view which we are taking. Those were cases, one of a sale and the other of a gift, and it was held that the alienee was not estopped by a judgment in a suit against the alienor, the suit having been commenced after the alienation. And the ground upon which these judgments were based is that stated by Romer, J., (as he then was) in *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.* (5), that is to say:

"a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase."

These decisions go so far at least as to show that some restriction must be placed on the apparent ambit of the words "claiming under" used in S. 11. In those cases no doubt the estate in litigation was wholly unrepresented in the earlier suits, while here it must be admitted that the estate was in the suit of 1898 partially represented. The consequence, however, seems to us to be the same. For in either class of cases you have the absence of the legal requirement that the estate shall in the former litigation have been efficiently represented. On these grounds we are of opinion that the question argued must be decided in favour of the plaintiff, that the lower appellate Court's decree must be set aside, and the appeal must be remanded for decision on the merits. Costs will be costs in the appeal. As to respondents 7 to 9, we have heard the learned pleader for the appellant, but we agree with the judgment of the lower appellate Court that no claim for Survey No. 13 can be made in this suit.

1. (1886) All 324.

2. (1879) 4 Cal 692.

3. (1905) 32 Cal 357 (P C).

4. (1911) 13 Bom L R 268.

5. (1894) 1 Ch D 578=63 L J Ch 366.

This finding will be taken into account by the lower appellate Court when the final decree is passed. As against respondent 6, the suit is dismissed with costs, he having disclaimed all interest in the property.

G.P./R.K.

Appeal remanded.

A. I. R. 1916 Bombay 206 (1)

SCOTT, C. J. AND HEATON, J.

Gautam Jayachand Gujar—Plaintiff—Appellant.

v.

Malhari Bapu Bhong—Defendant—Respondent.

Second Appeal No. 7 of 1915, Decided on 16th February 1916, from decision of Asstt. Judge, Poona, in Appeal No. 83 of 1913.

Dekkhan Agriculturists' Relief Act (1879), Ss 3 (y) and 10-A—Suit by money-lender against agriculturist—Nature of suit is not to be determined by frame of plaint but by allegations of parties raising question of mortgage or no mortgage.

Illus. (a) and (c), S. 10-A, shows to that the intention of the legislature was to apply the provisions of the section to suits by a money-lender to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage. [P 206 C 2]

Reading Cl. (y), S. 3 of the Act, by the light of S. 10-A the intention of the legislature was that the nature of the suit under Cl. (y) should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage or no mortgage.

[P 206 C 2]

D. A. Khare—for Appellant.

K. H. Kelkar—for Respondent.

Scott, C. J.—The plaintiff claims as the owner of the land in suit under a sale-deed executed in his favour by the previous owner Achyut in 1887, and as such owner claims possession of the land from the defendant, who, he alleges, became his tenant under a lease of even date with the sale-deed. The defendant's case is that his father, and not the plaintiff, was the purchaser from Achyut; that the plaintiff was the saokar who advanced money, and payment of the interest was secured by the contemporaneous lease. The defendant's case has been substantially held to be established on the facts by concurrent findings of two lower Courts, and we are bound by those findings. The question of law however has been raised whether this is a suit in which the real intention of the parties to the lease can be investigated under S. 10-A, Dekkhan Agriculturists' Relief

Act as being a suit for possession of mortgaged property within the meaning of S. 3 (y) of that Act. If strictly read it may be fairly argued that that Cl. (y) should only apply to suits where the plaintiff sues as mortgagee for possession of the mortgaged property. But the Dekkhan Agriculturists' Relief Act must be read as a whole, and as part of the Dekkhan Agriculturists' Relief Act we have S. 10-A which says:

"Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are trable wholly or in part under this chapter, the Court shall, etc."

Now the Illus (a) and (c) shows that the intention of the legislature, when this section was enacted, was to apply the provisions to suits by a money-lender suing to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage. That is exactly the case we have here, and therefore, reading Cl (y), S 3, by the light of S. 10-A, we must conclude that the intention of the legislature was that the nature of the suit under Cl. (y) should not be determined by the frame of the plaint, but by the allegations of the parties which raised the question of mortgage or no mortgage. That being so we think it cannot be doubted that the question raised upon the lease contemporaneous with the sale-deed of 1887 is a question which must be disposed of under S. 10 A. It has been so disposed of by the lower Courts, and therefore the point of law which has been raised must be decided in favour of the respondent. We affirm the decree and dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 206 (2)

BACHELOR AND SHAH, JJ.

Narhar Damodar Vaidya—Plaintiff—Appellant.

v.

Bhau Moreswar Joshi and others—Defendants—Respondents.

Second Appeal No. 255 of 1915, Decided on 24th July 1916, from decision of First Class Sub-Judge, Thana, in Appeal No. 73 of 1914.

Hindu Law—On a point of disputed succession Mitakshara holds good in the town of Mahad, Dist. Kolaba, and not the Vyavahara Mayukha.

The Mitakshara and not the Vyavahara Mayukha, is, upon a point of disputed succession, the predominant authority in the town of Mahad in the Kolaba District : 3 Bom 353, Ref. [P 209 C 1]

Jayakar, J. R. Gharpure and P. B. Shingne—for Appellant.

G. S. Rao and D. C. Virkar—for Respondent.

Batchelor, J.—The question before us is whether the Vyavahara Mayukha or the Mitakshara is, upon a point of disputed succession, the predominant authority in the town of Mahad in the Kolaba District. That question arises in this way. The property involved in the litigation belonged to one Narayan, and on his death was inherited by his sister Kashibai, who, under the law of this Presidency, took an absolute estate. Kashibai, dying, left a son and a daughter, and the controversy is as to which of these two is the preferential heir. Under the Mitakshara, the daughter, and under the Mayukha, the son, would be preferred. The present appellant, who was the plaintiff below, claims as a purchaser from the son of Kashibai, and contends for the paramount authority of the Mayukha. The contention has been disallowed both in the lower appellate Court and in the trial Court, where the learned Subordinate Judge, Mr. Sabnis, has written a well-considered judgment. Geographically the town of Mahad is situate in the southernmost taluka of the Kolaba District, and, though it stands on the north bank of the Savitri river, it is well within the Maratha or Maharashtra country, as that term is popularly understood. It is eight miles from Raigad, formerly a stronghold and capital of the Marathas. Prima facie it would seem therefore that the Vyavahara Mayukha would not be the prevailing authority.

It is however argued for the appellant that Mahad must be taken to fall within a somewhat ill-defined phrase "the Northern Konkan," where, it is said, the Mayukha is predominant. Following the argument at the Bar, I will assume that the Mayukha is predominant in the Northern Konkan, leaving that phrase for further explanation. There are dicta to that effect of many Judges, and it is

unnecessary for our present purposes to question the authority of these dicta. The question, then, will be whether the town of Mahad falls within or without what was meant by the Judges when they said that the Mayukha is the prevailing authority as well in the North Konkan as in the land of Bombay and the Province of Gujarat. In the first place, it is desirable to have a clear understanding as to what is meant by the "Konkan." That phrase is explained in the first sentence in the introduction to the Bombay Gazetteer, Vol. 1, Part 2, where we read

"The Konkan is now held to include all the land which lies between the Western Ghats and the Indian Ocean, from the latitude of Daman on the north to that of Terekhol, on the Goa frontier, on the south."

In Vol. 2, at p. 20 of Mr. Erskine's History of the Emperors Babar and Humayun, the learned author says :

"After the death of Muzaffar Shah, several of his descendants increased the territory of Gujarat. His grandson, Ahmed Shah, a very distinguished prince and the founder of Ahmedabad, reduced under his power nearly the whole country that forms the present Gujarat, including the low lands to the South below the Ghats, the Northern Konkan and the island of Bombay."

This passage is cited towards the end of Sir Michael Westropp's judgment in *Sakharam Sadashiv Adhikari v. Sitabai* (1) and constitutes one of the earliest pronouncements of the Court in favour of the predominance of the Mayukha in the Northern Konkan. The boundary of the Northern Konkan is not described in this judgment, but at p. 10 of the Gazetteer, Vol. 1, Part 2, we read :

"Whatever the old signification of the word may have been, the name Konkan is now used in the sense first mentioned, and the modern division of the District is into North and South Konkan, meaning the parts north and south of Bombay. The boundary between the North and South Konkan is however sometimes considered to be the Savitri river, which divides the Habshi's territory from Ratnagiri, as, for some years after the English conquest, the District of the North Konkan included the sub-divisions as far south as the Savitri."

It is, in my opinion, reasonable to suppose that the "North Konkan" of Westropp, C.J.'s judgment in *Sakharam's* case (1) was the tract denoted by the modern usage of the phrase, and not the tract extending to the Savitri river. Indeed the line of division between the North and the South Konkan for our present purposes is not, I think, difficult

1. (1810-12) 3 Bom 353.

to fix if we remember the reason upon which the difference is founded. That reason is historical and flows from the circumstances that the tract called the North Konkan was, while the South Konkan was not, under the immediate sway of the kingdom of Gujarat. From a passage to be found at p. 763 of Elphinstone's History of India, it appears that Bassein and Bombay were detached possessions of the kingdom of Gujarat, and it seems to me clear, from the various passages, to which Mr. Rao has drawn our attention, that that kingdom never extended south of the towns or villages Cheul and Nagothna, which are to be found in the Northern or Alibag taluka of the Kolaba District. In Vol. 1, Part 2 of the Gazetteer, we read at p. 34 "The kingdom of Gujrat extended as far South as Nagothna" and at p. 45 :

"The Northern Konkan as far South as Nagothna had always belonged to Gujarat, but the Southern Konkan had only just been divided between the dynasties of Bijapur and Ahmednagar."

In the Kolaba Gazetteer, Vol. 11, p. 142 it is stated :

"Towards the close of the 15th century (1489) the inland part of Kolaba passed from the Brahmini to the Ahmednagar Kings. The sea coast, including at least Nagothna and Cheul, remained in the hands of the Gujarat Kings, till, in 1509, the overlordship of Cheul passed from Gujarat to the Portuguese. After this, though the coast boundary of Gujarat shrank from Cheul to Bombay, the Gujarat Kings continued to hold the fort of Sangaza or Sankshi in Pen till 1540, when it was made over to Ahmednagar."

In the Thana Gazetteer, Vol. 13, Part 2, there are two passages bearing upon the same point. One of them runs :

"Some years later (1508) Mahmad Begada still further increased his power. He effected his designs against Bassein and Bombay, established a garrison at Nagothna, and sent an army to Cheul. At this time when Gujarat power was at its highest, according to the Mirat-i-Ahmadi, Daman, Bassein and Bombay were included within the Gujarat limits (p. 443)."

The other passage, at p. 448, referring to a later period says :

"A few years later (1514) the southern boundary of Gujarat had shrunk from Cheul to Bombay."

In accordance with the history thus narrated, we find that, after the establishment of British authority, Mahad was by the earliest authorities included in the Southern Konkan. At p. 159 of the Kolaba Gazetteer, Vol. 11, the change is described in these words :

"After they came into the hands of the British in 1818, the three sub-divisions of Sankshi (Pen), Rajpuri (Roha), and Rayagad formed the Northern part of the South Konkan or Ratnagiri Collectorate ;"

and in a foot note in which the details of these acquisitions are set forth, we read that

"the British Government took possession of the sub-divisions of Sankshi, Rajpuri, and Rayagad, then forming the Northern part of the South Konkan."

This tradition is continued in the Government Selections, New Series No. 278, pp. 12 and 13, where the term "South Konkan" as distinguished from "North Konkan" is explained as the tract including all the present Kolaba District, except the taluka Karjat and Panvel, which are to the North of the Alibag taluka of Kolaba, being separated from it by the Dharamtar creek. These historical references satisfy me that when the learned Judges of this Court spoke of the tract of country known as the North Konkan being under the predominance of the Mayukha, that tract was understood to extend no further south than the Alibag taluka, and therefore cannot be held to have comprised the town of Mahad. The only decided case from which the appellant seeks support for his argument is Sir Michael Westropp's decision in *Sakharam Sadas Shiv Adhikari v. Sitabai* (1). There, as I have stated, the passage from Mr. Erskine's History is cited, and the undefined term "Northern Konkan" is brought within the ambit of the paramountcy of the Mayukha. That case however is in my opinion of no assistance to the present appellant, for the learned Judges there did not define what they meant to include in the term "North Konkan," and the case before them came from Karanja, which is just across the harbour from the island of Bombay. The historical references in the judgment are no more than the basis for the conclusion which is expressed on pp. 367-368 that it would be incongruous to declare that the Hindus on the one side of the harbour were subject to another law of succession from that which governed those on the other side. At the most the case would be an authority for the view that the phrase "North Konkan" must be held to include Karanja, but as Karanja is very much to the north of Mahad, that decision would not serve the appel-

lant's turn. It is also to be observed that the observations now under notice were made obiter, as the decision of the case was based on other grounds which will be found explained at pp. 363 and 368 of the report. This being so, it is not possible to follow Mr. Jayakar's argument when he would fasten supreme importance on a passing phrase in which the learned Chief Justice notices the historical fact that

"formerly, the boundary between the Northern and Southern Konkan was deemed to be the Savitri river, which divides the Habshi's territory from the Ratnagiri Collectorate and enters the sea at Bankot."

The Court by no means decides, as would be necessary for the plaintiff's case that the Savitri river was then the boundary between the North and South Konkan. It is merely stated that at some previous time the river was deemed or supposed to be the boundary. In my opinion, the authorities, to which I have alluded, establish that the town of Mahad is not within the Northern Konkan, which the Judges have referred to as subject to the predominance of the Mayukha, and the predominance of the Mayukha cannot either on principle or on authority be taken further south than Cheul and Nagothna or than the point where it appears to have been carried by the decision of *Sakharam Sadashiv Adhikari v. Sitabai* (1). For these reasons, I think that the lower appellate Court's decree is right, and that this appeal should be dismissed with costs.

Shah, J.—I am of the same opinion, generally for the reasons given by my learned brother. It is quite clear that Mahad forms part of the Southern Konkan, where the Mitakshara and not the Vyavahara Mayukha is the governing authority on points of Hindu law, when there is a conflict between them.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 209

SCOTT, C. J. AND HEATON, J.

Ismail Allarakhia—Plaintiff—Appellant.

v.

Dattatraya R. Gandhi—Defendant — Respondent.

Original Civil Appeal No. 59 of 1915, Decided on 1st February 1916, against decree of Macleod, J.

Contract Act (1872), Ss. 20 and 65—Mortgage by person personating real owner—

1916 B/27 & 28

Mortgagee transferring mortgage rights — Deed containing covenant for good title— Fraud discovered and transferee suing for refund of consideration—Parties were under mistake as to essential fact and contract is void—Rule of caveat emptor did not apply.

C executed a mortgage-deed to D falsely personating M, the real owner of the mortgaged property. D transferred his mortgage right to A for a consideration and in the deed of transfer both C and D covenanted good title. C forged M's signature in both the deed of mortgage and its transfer. A, having discovered the fraud, instituted the present suit against D, for refund of the consideration paid by him to D:

Held: (1) that, as both plaintiff and defendant were under a mistake as to an essential fact, viz., that the real owner M made himself liable on the mortgage and confirmed the covenant as to title, the transfer-deed was void under S. 20 and the defendant was bound to repay the transfer money to plaintiff under S. 65: *Clare v. Lamb* (1875), 23 W R 389 and *Bree v. Holbeck* (1781) 2 Dougl. 654, *Expl.*; *Johnson v. Johnson* (1802) 3 B. P. 162, *Ref.* [P 210 C 2]

(2) that the maxim caveat emptor did not apply as the real owner of the property never, in fact, joined in the transfer. [P 210 C 2]

Jinnah—for Appellant.

Kanga—for Respondent.

Scott, C. J.—Under the will of Louis Mary Valladares two of his three sons, namely, Joseph Francis and Louis Mary, became entitled as tenants-in-common to equal moities of the testator's house at Mazagaon. The third son Calisto was, by the will, given a right of residence in the house so long as he lived in harmony with his brothers and sisters. On 13th June 1914, Calisto, fraudulently representing himself to be his brother, Louis Mary, and so entitled to an equal moiety in the house, purported to mortgage such moiety in favour of Abdul Latif Sumar. On 10th September 1914, Calisto, again fraudulently representing himself to be his brother Louis Mary, purported to create a second mortgage of the said moiety in favour of the defendant, Dattatraya R. Gandhi. Both the first and second mortgages were registered, as Calisto fraudulently represented himself to be Louis Mary before the Sub-Registrar. On 19th July 1915, Calisto again fraudulently representing himself to be the said Louis Mary purported, as Louis Mary, to join in a transfer executed on that date by the defendant to the plaintiff in consideration of the sum of Rs. 1,770. By the transfer Calisto personating Louis Mary purported to consent to the transfer for the sum of Rs. 1,770, agreed to be the amount owing to the defendant

by the mortgagor under the second mortgage of 10th September 1914. Under the transfer the transferee was expressed to get the full benefit of the covenants contained in the second mortgage and to the transfer of the moiety and all the estate, right, title and interest of the mortgagee and the mortgagor therein. The mortgagee covenanted expressly that he had not incumbered. The covenants of which the transferee was expressed to get the benefit with the consent of the mortgagor included the mortgagor's covenant for title that he had power to transfer.

The intention of the transferee was clearly to have the settlement of the mortgage-debt and the mortgagor's covenants for title in the second mortgage confirmed by the mortgagor. For this purpose the mortgagor was a necessary party. The transfer was however never executed by him but by a forger in his name. The result was that the transferee had no recourse against the mortgagor after discovering that the second mortgage was a mere fictitious security. He now sues the defendant as transferor for return of the purchase-money as on a total failure of consideration. The learned Judge, being of opinion that the case could be disposed of on the authority of *Clare v. Lamb* (1) and *Bree v. Holbech* (2), applied the maxim "caveat emptor" and dismissed the suit. We are unable to agree in the conclusion arrived at by the lower Court.

In *Clare v. Lamb* (1) the Court recognized the correctness of the following statement of the law in Sugden's Vendors and Purchasers:

"Although the purchaser has paid money, yet if he is evicted before the conveyance is executed by all the necessary parties he may recover the purchase money in an action for money had and received,"

and in Dart on Vendors and Purchasers [Ed. 7, P. 612] that:

"Until the conveyance is executed by all necessary parties the vendor remains liable in respect to all defects in title. He must, for instance, refund the purchase-money, if the purchaser having paid it, even though he has taken possession, is evicted by an adverse claimant."

In *Johnson v. Johnson* (3), where a conveyance of property of a testator required execution by three trustees

under the will and was only executed by two, the purchaser on eviction under a superior title for one of the parcels conveyed was held entitled to recover the purchase-money in respect of that parcel. In the case before us the supposed Louis Mary was rightly deemed a necessary party to the transfer and the deed was prepared upon that footing, but the transfer was never executed by Louis Mary. The defendant cannot successfully rely upon the transfer till it has been executed as drawn. The purchaser cannot be made liable on the maxim of caveat emptor if the owner, from whom he believed he was to get a confirmation both of the covenant for title and of the transfer of the mortgagor's estate in the premises, never in fact joined in the transfer. If the stage of complete execution by all necessary parties is not reached there is no reason for not applying the rule of the Indian Contract Act, S. 20:

"Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void."

Here both plaintiff and defendant believed that Louis Mary was agreeing to the amount due on the mortgage and confirming the covenants contained therein, and agreeing to the transfer of the mortgagor's estate in the mortgaged premises, whereas in fact he was no party to the negotiations. The defendant is therefore under S. 65, bound to repay the transfer money. It is unnecessary in the view we take to discuss the arguments addressed to us on the covenants for title implied under S. 55 (2), T. P. Act. We set aside the decree dismissing the suit and pass a decree for the plaintiff for the sum claimed with interest and the costs of suit throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1916 Bombay 210

BACHELOR AND SHAH, JJ.

Dattatraya Sakharam Devli—Plaintiff—Appellant.

v.

Govind Sambhaji Kulkarni—Defendant—Respondent.

Second Appeal No. 899 of 1913, Decided on 1st February 1916 from decision of Addl. First Class Sub-Judge, Ratnagiri, in Appeal No. 252 of 1912.

1. (1875) 10 C. P. 334.

2. (1781) 2 Dougl. 654.

3. (1802) 3 B & P 162.

Hindu Law—Adoptions — Property of natural father vesting before adoption—Adoption divests son of such rights.

An adoption under the Mitakshara has the effect of divesting the adopted son of all rights to the property of his natural father, even where the property had become exclusively vested in him before the adoption: 29 *Mad* 437, *Dist. from*; 1 *C W N* 121, *Dist.* [P 212 C 1]

Per *Shah, J.*—There is nothing repugnant to Hindu Law in insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property which may have devolved upon him in the family of his birth. The divesting of vested estates is by no means an uncommon incident of adoption under certain circumstances, and seems to be quite consistent with Hindu Law. [P 212 C 2]

A. G. Desai and *S. Y. Abhyankar*—for Appellant.

P. B. Shingne—for Respondent.

Shah, J.—The facts, which have given rise to this second appeal, are briefly these: — One Mahadev and his brother Shambhaji were divided in interest. Mahadev died more than 20 years ago, leaving a widow Parvatibai, a son Ramchandra, and daughters. After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior. The properties in suit, which were originally assigned to the share of Mahadev and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption. Dattatraya filed the present suit in the Court of the class Subordinate Judge at Devgad to enforce his mortgage, to recover possession and to obtain an injunction. It was filed against Shambhaji's sons, who were defendants 1 and 2, and Parvatibai represented by her heir and daughter as defendant 3. Defendants 1 and 2 contested the plaintiff's claim, and urged, among other things, that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Parvatibai had no right to mortgage the property, as Ramchandra was alive. The trial Court as well as the lower appellate Court have allowed this contention, with the result that the plaintiff's suit is dismissed with costs.

Mr. Desai for the appellant (plaintiff) has questioned the correctness of this view, and has urged in support of the appeal that on Ramchandra's adoption, all his rights to the property of his

natural father which devolved on him on his father's death, came to an end, that his connection with the family of his birth ceased, and that Parvatibai inherited the property as the next heir of Ramchandra or Mahadev, when Ramchandra was given away in adoption. The question of law that arises is, whether or not according to Hindu law a boy given in adoption loses after adoption all his rights which he may have acquired to the property of his natural father before the date of the adoption. The parties are governed by the Mitakshara; and it is conceded, indeed it seems to me to be indisputable, that if a boy is given in adoption during his father's lifetime, he would lose all the rights to the property of his natural father, even though he may have, as under the Mitakshara law he would have, a vested interest in that property from the date of his birth. That is, in the present case, if Ramachandra had been given in adoption during Mahadev's lifetime he would have lost all vested interest in the property in dispute, and it would have devolved on Parvatibai on Mahadev's death. The point is therefore limited to a case in which the property has become exclusively vested in the boy before the date of his adoption.

This is apparently a point of first impression so far as this Presidency is concerned; and apart from certain decisions of other High Courts to which I shall refer later, the point does not appear to me to present any difficulty. The text of Manu (Adhyaya 9, verse 142) bearing on this point is clear. It is translated in Vol. 25 of the "Sacred Books of the East" at p. 355 as follows:

"An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)"

There are two readings of this verse; in the one which is adopted in the different modern editions of the Manusmriti, such as the Nirnaya Sagar Press edition and the Manava Dharma Sastra edited by Mr. Mandlik, the words *haret* (...) and *kvachit* (...) are used, whereas in the other, which is adopted by Vijnyaneswara and Nilkantha in quoting the verse in the Mitakshara and the Vyavahara Mayukha, the words used instead are *bhajet* (...) and *sutah* (.)

respectively. In my opinion it makes no difference in the result, whichever reading is adopted. Mr. Shingne has however relied upon the second reading as favouring his contention. If it were necessary to make a choice between the two readings, I should certainly prefer the reading adopted in all the modern editions of the Manusmriti to that adopted by Vijnyaneswara and Nilkantha in quoting the verse.

The meaning of the verse is clear. The son given in adoption is not to take the gotra or the riktha of his natural father. His dissociation from the family (gotra) as well as the estate is insisted upon in unequivocal terms. There is no room for the distinction sought to be made by Mr. Shingne that the prohibition against taking is confined to the inheritance after the adoption, and does not extend to what is already inherited before the adoption. The text generally prohibits the taking by the adopted son and does not restrict the taking to that which would devolve on him after the adoption. It lays down that the adopted son shall never take or claim the estate of his natural father. The words are wide enough to include the estate vested in him at the time of adoption, provided it is the estate of his natural father. In my opinion the text should be so read as to give effect to the fundamental idea underlying an adoption, viz., that the boy given in adoption gives up the natural family and everything connected with the family and takes his place in the adoptive family, as if he had been born there, as far as possible.

It was urged by Mr. Shingne that there was no provision in the text as to divesting an estate once vested in a person, and that the person leaving the family of his birth cannot be divested of property exclusively vested in him before adoption. But this argument ignores the essential idea of an adoption. There is a change in the position of the boy, and this divesting of the estate of the natural father is an incident, and, in my opinion, a necessary incident, of that change. The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father, if the adoption takes place in his father's lifetime. To that extent the rights vested in him are divested after

adoption. If the divesting of a vested interest so far is to be allowed, I do not see any difficulty in holding that, even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption. It seems to me that there is nothing repugnant to Hindu law in thus insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property, which may have devolved upon him in the family of his birth. The divesting of vested estates is by no means an uncommon incident of adoption under certain circumstances, and seems to me to be quite consistent with the Hindu law.

It has been urged by Mr. Shingne that if the adopted boy can take his self-acquired property with him and is under no obligation to leave it in the family of his birth, there is no reason why he should be treated differently with reference to the property which has vested in him exclusively on the death of his father before the adoption. But this argument ignores the difference between his self-acquired property and the estate which has become vested in him exclusively on his father's death. In one case the property is his own, and in the other it is the property of his natural father. The text of Manu refers to the estate of the natural father, and the mere fact that he is dead at the time of adoption and that it has become the property of his son at the time, does not change the character of the property for the purposes of the rule laid down by the text, and it cannot be treated as his self-acquired property.

This conclusion is in consonance with the Mitakshara and the Vyavahara Mayukha, wherein the text of Manu is referred to with approval: see Mitakshara, Ch. 1, S. 11, Para. 32, in Stokes' Hindu Law Books, at pp. 422-423, and Mandlik's Hindu law, p. 59. I quite recognize, as pointed out by Mr. Shingne, that in neither of these works is the case, such as we have here, specifically provided for. But neither the Smriti writers nor the commentators contemplated the case of an only son being given in adoption after his father's death, and naturally did not advert to such a case. But a general rule is laid down, which

is comprehensive enough to include the present case. I do not desire to place any great reliance upon the Dattaka Mimansa and the Dattaka Chandrika ; but my conclusion is consistent with the view taken of Manu's verse in both these works : see Stokes' Hindu Law Books, at pp. 599 and 640.

It is necessary to note briefly the decisions in which a contrary view is taken, and which have enabled Mr. Shingne to raise the various contentions already dealt with. The case of *Behari Lal Laha v. Kailas Chunder Laha* (1) is a decision under the Dayabhaga Law, and the text of Manu has not been referred to in the judgment. Besides a different view is taken by at least one of the learned Judges who decided the case of *Birbhadra Rath v. Kalpataru Panda* (2). I am unable therefore to accept this decision as a guide in deciding the present case under the Mitakshara. I desire to point out with reference to the passage quoted by Ameer Ali, J., in *Behari Lal's* case (1) from the well-known case of *Mt. Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (3) that it has no bearing on the present question. Their Lordships of the Privy Council point out that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession cannot be defeated and divested. But here we are concerned with the effect of adoption on the property vested in the boy given in adoption at the time, and which originally formed part of the estate of his natural father. With reference to it we have a text of Manu, which has been referred to in the Mitakshara and the Vyavahara Mayukha and which has to be construed, and an intelligible principle underlying it, which has to be considered and applied. I feel quite clear that the observations in *Bhoobun Moyee's* case (3) do not touch the present point. The decision of the Madras High Court in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (4) is directly in point and undoubtedly conflicts with the view I take of the Hindu law on this point. I have already stated some of the reasons for not adopt-

ing the view, which has found favour with the Madras High Court, in dealing with Mr. Shingne's contentions. I need hardly add that I have considered the judgment with care and respect, to which it is undoubtedly entitled, but unfortunately I am unable to agree with it, and it is plainly my duty to give effect to my view, as the decision is not binding upon this Court. It is clear from the judgment that the learned Judges were influenced by the decision in *Behari Lal Laha's* case (1) and that they did not consider the texts to be explicit enough to require them to dissent from that view. As regards the observations of the Privy Council quoted and relied upon at p. 450 of the report, I do not think that they bear upon the present point.

The general rule stated by their Lordships of the Privy Council must be taken with reference to the point which had to be considered and decided in the case: see *Moniram Kolita v. Keri Kolutani* (5). Its application in the Madras case seems to me to be far-fetched. Here we have to consider the case of an adoption, and a particular text bearing upon the point arising in the case. On all these grounds it seems to me that the lower Courts are wrong in holding that the property in suit is still vested in Ramchandra. On his adoption, the property went to the next heir in the family of his birth and, therefore, Parvatibai was competent to mortgage it. In this case it is not necessary to consider whether on Ramchandra's adoption the property would go to his heirs or to his father's heirs, as in any view of the matter Parvatibai would be the next heir. It is satisfactory to find that this decision avoids the obvious anomaly of allowing defendants 1 and 2, who belong to the natural family of Ramchandra and who are more distant relations than Parvatibai, to hold the property to the exclusion of the next heir (Parvatibai) on the footing that the property still belongs to Ramchandra, who has left their family. The result, therefore, is that the decree of the lower appellate Court is set aside, and the suit remanded to the trial Court for disposal on the merits. All costs up to date to be costs in the suit.

Batchelor, J. — I am of the same opinion. With great respect to the learn-

1. (1897) 1 O W N 121.

2. (1905) 1 CL J 388.

3. (1865) 3 W R 15=10 M I A 279 (PC).

4. (1906) 29 Mad. 437.

5. (1880) 5 Cal 776=7 I A 115.

ed Judges who decided the case in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (4), I am unable to doubt that the texts are in favour of the appellant's contention; and on the question of principle, apart from the texts, I see no difficulty in holding that property which vested in A as being the son of B becomes divested when A ceases to bear that character.

G.P./R.K.

*Decree set aside.***A. I. R. 1916 Bombay 214**

BEAMAN, J.

Pratabchand Gulabchand—Plaintiff.

v.

Purshotamdas Malji and others—Defendants.Original Civil Suit No. 244 of 1915,
Decided on 6th October 1915.**Stamp Act (1899), S. 35—Promissory note—Instrument providing for payment of monthly interest does not fall under absolute prohibition of S. 35,**

Ordinarily where a person acknowledges to have received a definite sum of money on a certain date for a certain term, there can be no reasonable doubt but that what he means is that on the expiration of that term he is willing to pay the money on demand.

But the insertion of a term for the payment of monthly interest is altogether inconsistent with the legal notion of a promissory note, and an instrument containing such a term does not fall under the absolute prohibition of S. 35.

[P 214 C 2]

Jinnah, Strangman and Wadia—for Plaintiff.*Desai and Kanga*—for Defendants.

Judgment.—The first point raised and argued in limine is whether the writing of 14th September 1911 is admissible in evidence. If it is a promissory note, it is clearly insufficiently stamped, and therefore inadmissible under S. 35, Stamp Act. I should have had very little hesitation, notwithstanding the decisions in the cases of *Govind Gopal v. Balwantrao Hari* (1) and *Tirupathi Goundan v. Rama Reddi* (2), in holding that this was in substance a promissory note although it does not contain an express promise to pay, but for the term inserted in it for the repayment of interest at nine per cent. per annum every month. Had that term been omitted, I do not know how it could have been contended that the mere omission of the words "I promise to pay at the expiration of three years' period" would re-

ally have affected the character of the document, or could have been imported as a qualification of the intention of the parties who made it at the time of its making. That very restricted mode of interpretation has, it must be admitted, found favour with very learned and eminent Judges, who discover in the absence of such words as "I promise to pay" and the substitution for them of such words as "I am liable" a sufficient ground of distinction upon which to declare that the writings containing the former expression are, while those containing the latter expression are not, promissory notes.

But, with the greatest deference, I find it too difficult to impose such weight upon the letter, while entirely ignoring the quite transparent spirit, of the transaction. Ordinarily where a person acknowledges to have received a definite sum of money on a certain date for a certain term, there can be no reasonable doubt but that what he means is that on the expiration of that term he is willing to repay the money on demand. Here however the whole complexion of the document of 14th September 1911 is, I think, completely changed, and changed too not only in form but in substance, by the insertion of the term for the payment of monthly interest upon which Mr. Jinnah has relied. I think there is no answer to his argument that such a term is altogether inconsistent with the legal notion of a promissory note and that his clients were at liberty at any time during the currency of the three years' period to bring a suit or suits for any interest which may have fallen due and remained unpaid under this clause. Not only is the existence of such a clause repugnant to the essential character of a commercial document negotiable by mere endorsement such as a promissory note, but it would, in my opinion, render the negotiability practically impossible while establishing legal relations between the parties anterior to the period at which alone the principal sum is to be called in.

I think therefore that the agreement of 14th September 1911, whatever else it may be, is not a promissory note, and therefore does not require the stamp of Rs. 125 which otherwise it would have done, nor falls under the absolute pro-

1. (1898) 22 Bom 986.

2. (1898) 21 Mad 49.

hibition of S. 35. It is probably correctly stamped, though it is unnecessary to express any opinion upon that at present; but even if it were not, it would become admissible in evidence upon payment of the required penalty. I decide the preliminary point in favour of the admissibility of the document, provided that should it be found to be insufficiently stamped the deficiency and penalty be duly paid.

G.P./R.K. *Order accordingly.*

A. I. R. 1916 Bombay 215

BATCHELOR AND SHAH, JJ.

Narayan Ramkrishna Pandit and others—Defendants—Appellant.

v.

Vigneshwar Ganap Hegde and others—Plaintiffs—Respondents.

First Appeal No. 277 of 1913, Decided on 6th January 1916.

(a) Deed—Construction—Sale of land for previous debts due—Vendors entitled under deed to re-purchase on payment of sale consideration within 20 years—By instrument of even date land leased to vendors—Transaction was sale and not mortgage.

A deed of transfer executed by plaintiffs to defendants in 1904 recited that the amount due to the latter in respect of a pre-existing mortgage on plaintiffs' lands was Rs. 13,000 inclusive of interest, and as excessive interest had to be paid and great loss was caused to the plaintiffs' family, the plaintiffs sold some of the lands to defendants for the said sum to extinguish the debt. The deed reserved to the vendors liberty to re-purchase the lands on payment of the sale consideration at any time within 20 years. By an instrument of even date, the vendees leased the land to the vendors plaintiffs for an annual rent of Rs. 412 which however was liable to reduction in proportion to any fractional payment of the sale price. The parties agreed that the costs of re-purchase by the plaintiffs were to be borne by them in equal shares. In a suit brought by the plaintiffs in 1911 for redemption:

Held: that the transaction was a sale and not a mortgage: 40 Bom 74, Ref. [P 217 C 1]

(b) Transfer of Property Act (1882), S. 58 (c)—Per Batchelor, J.—S. 58 (c) comes into operation only when there is mortgage.

Per Batchelor, J.—S. 58 defines what a mortgage is and Cl. (c) of the section describes one method of effecting a mortgage, viz., the method of mortgaging by conditional sale. But the words of Cl. (c) are not to be read in an isolated manner, but in reference to para. 1 of the section, and when they are so read, it is manifest that Cl. (c) comes into play only when there is a mortgage, as that term has been defined.

[P 215 C 2]

Coyaji and S. S. Patkar—for Appellant.

Bhandarkar and G. P. Murdeshwar—for Respondents.

Batchelor, J.—The only question involved in this appeal is, whether the document, Ex. 25, executed by the plaintiffs in favour of the defendants, is, as on its face it purports to be, a sale or is in reality a mortgage in the guise of a sale. The plaintiffs' suit was brought to redeem the mortgage which, as the plaintiffs alleged, was effected by this Ex. 25, so that admittedly the suit must fail if it should be held that no mortgage is created by this document. The learned Judge below was of opinion that Ex. 25 was in reality a mortgage, and the grounds of this opinion are stated by him in the following words. After referring to the terms providing for the condition to re-purchase the property after the lapse of twenty years, the Judge says:

"But for the addition of these terms the deed (Ex. 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Ex. 25 that the sale should become void on payment of Rs. 13,000 by instalments or in a lump sum within twenty years: vide Cl. (c), S. 58, T. P. Act. Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage."

But it seems to me clear that the question, whether Ex. 25 effects a mortgage or a sale, is not to be answered by mere reference to Cl. (c), S. 58, T. P. Act. And, if I am not mistaken, to decide the point upon this view is to assume what is really in dispute. For, S. 58, T. P. Act defines what a mortgage is, and Cl. (c) of the section describes one method of effecting a mortgage, viz., the method of mortgaging by conditional sale. But the words of Cl. (c) are to be read not in an isolated manner, but in reference to para. 1 of the section, and when they are so read, it will be manifest that Cl. (c) comes into play only when there is a mortgage, as that term has been defined. Now from the definition itself there is no mortgage, except where there is a transfer of an interest in specific immovable property for the purpose of securing the payment of a debt, and the whole question involved in this debate is, whether the Rs. 13,000 paid for the lands transferred by Ex. 25 was an out and out price paid for land sold or was a continuing debt secured by a transfer of the immovable property. To decide between those two theories we must look at the intentions of the parties, as

those intentions have been disclosed in the documents executed. As was said by Lord Chancellor Cranworth in *Alderson v. White* (1) :

"in every such case the question is, what, upon a fair construction, is the meaning of the instruments."

Now the material passage in the principal instrument, Ex. 25, after referring to the execution of prior mortgages, recites that in all Rs. 13,000 are found due to the defendants by the plaintiffs at the date of the document. Then the instrument continues :

"It was not convenient to pay you this amount for the reasons mentioned above. Moreover excessive interest is to be paid for the said debt, and if, by reason of the inconvenience to pay it from the income of the family lands, the amount remains unpaid, it appeared that great loss might be caused to the family. So all of us who are members of the family considered this matter and decided that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale-deed all the debts incurred by our family up to this time, in full satisfaction of our debts."

Now pausing there, it seems to me difficult to imagine language more clearly and unequivocally expressive of a sale as opposed to a mortgage. There is no ambiguity in the minds of the parties, who themselves refer to the pre-existing mortgage and in contrast with it declare that they now effect a sale for the precise purpose of extinguishing the debt which had been secured by this mortgage. That is the contract which the parties, in the plainest possible language have set their hands to. Is there anything in the rest of the case to indicate that this, the plain meaning of Ex. 25, is not the meaning which the parties intended and which the Court should now enforce? The sole circumstance to which the respondents-plaintiffs were able to point is the last passage occurring in Ex. 34, the permanent lease which the defendants gave to the plaintiffs on 6th August 1904. By these words it is provided that :

"if we (the plaintiffs) pay any amount out of the amount in respect of the said sale-deed, we shall deduct rent in proportion to the amount paid thus and go on paying the remaining rent."

It may be that if there were in the case any substantial consideration in plaintiff's favour, the Court might see its way to draw an inference in their favour from this provision. But when all the

circumstances are considered, it appears to me that this provision carries the case no further than it is carried by the condition that it shall be open to the plaintiffs at any time within twenty years to repurchase the land by payment of the price either in a lump sum or in instalments. Clearly however the mere giving of an option to the plaintiffs to repurchase the land does not of itself operate to create a mortgage. And when attention is paid to other circumstances appearing on the record, the theory of a mortgage must be set aside. Admittedly when Ex. 25 was executed, the defendants already had a mortgage on the lands transferred by Ex. 25. Since that mortgage the debt due to them had increased from Rs. 8,000 to Rs. 13,000. And yet if the plaintiffs' case is right, the creditor is content to take only a further mortgage on the twenty lands transferred by Ex. 25 and give up the security which under the pre-existing mortgage he already had on seventy-two other lands belonging to the debtors.

Moreover the documents make no provision for the payment of interest. It is said that the Rs. 412 reserved as annual rent under Ex. 34 may properly be regarded as interest running on the Rs. 13,000. But even that theory does not assist the plaintiffs. For, upon that footing the creditor is content to receive only interest at the unusual and unusually low rate of 3½ per cent whereas his earlier mortgage gave him interest at 8 per cent. There is no provision in the documents for the taking of any accounts, although the documents provide that the purchasers may spend any sum they like on improving the property. The documents lay down that in the event of repurchase by the plaintiffs, the costs of this repurchase are to be borne half and half between the plaintiffs and the defendants, and it seems to me extremely unlikely that if this transaction were in truth a mortgage, the mortgagee would consent to bear half the expenses of the reconveyance.

I notice, lastly, that it is not suggested that the Rs. 13,000, the consideration of Ex. 25, is not a fair price for the lands conveyed by the instrument. On the whole therefore though I have not overlooked the general considerations to which I referred in *Kastur-*

1. (1858) 2 De G & J 97.

chand Lakhmaji v. Jakhia Padia Patil (2), I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted as being in reality that which in the plainest language both parties declared it to be, viz., a transaction of sale with an option to the plaintiffs to repurchase. On these grounds, in my opinion, the appeal must be allowed and the plaintiff's suit must be dismissed with costs throughout.

Shah, J.—I am of the same opinion.
G.P./R.K. *Appeal allowed.*

2. (1916) 40 Bom 74=31 I C 388.

A. I. R. 1916 Bombay 217

SCOTT, C. J. AND HAYWARD, J.

Hansa Godhaji Marwadi—Defendant Appellant.

v.

Bhawa Jogaji Marwadi—Plaintiff—Respondent.

Second Appeal No. 387 of 1914, Decided on 10th November 1915, from decision of Asst. Judge, Poona, in Appeal No. 252 of 1912.

Civil P. C. (1908), S. 47 and O. 21, Rr. 2 and 11 (e)—Decree satisfied out of Court—Payment not certified—Application for execution filed containing false statement that there was no adjustment—Court cannot permit unjust order in execution.

A Court should not, in the exercise of its duty under S. 47, allow a clear case of fraud to be covered and condoned by the provisions of O. 21, R. 2. [P 218 C 1]

A money decree was satisfied out of Court, but the satisfaction was not certified to the Court. Despite the satisfaction of his decree the judgment-creditor applied thrice for execution of his decree and on each occasion stated falsely that there had been no adjustment or satisfaction.

Held: that as the judgment-creditor was trying to obtain, and was in fact obtaining, fraudulent execution of his decree which had already been satisfied, a fraud had clearly been committed upon the Court by reason of the false statements made by the judgment-creditor, and that the Court would not permit him by means of such false statements to obtain an unjust order in execution. [P 218 C 1]

Coyajee and J. R. Gharpure—for Appellant.

B. G. Rao—for Respondent.

Judgment.—The material facts are that on 13th March 1899 the plaintiff, who is the present respondent, got a decree for Rs. 2,508 with interest and costs against Hansa Godhaji, a minor. Both the parties are Marwadis. On 14th March the members of the caste assembled, and, as is held by the

trial Court, effected a compromise for Rs. 2,000 in full satisfaction of the decretal debt, and, as the first Court holds, the money was paid by the appellant's mother and a receipt was passed which was signed by the plaintiff and attested by two witnesses. That payment was not, however, certified to the Court. On 12th March 1902 the plaintiff made an application for execution of his decree. According to the Code he was obliged, as provided by S. 233 (e), to state in writing upon his verification whether any and what adjustment had been made by the parties subsequent to the decree. He stated that there had been no adjustment. That statement was false according to the finding of the trial Court. The application for execution did not, however, proceed because the plaintiff neglected to pay the fees and so no notice was given to the judgment-debtor who had no knowledge of the application. The judgment-debtor attained majority in 1904, and just before the expiry of three years from the date of the previous application in execution, viz. on 10th March 1905, the plaintiff made another application for execution in which he again made a false statement with reference to what was required to be stated as to adjustment in his application.

Again he omitted to pay the fees and in consequence no notice was given to the judgment-debtor. On 12th February 1908 a further application was made containing a similar false statement, and that also was not proceeded with by reason of the plaintiff not paying the fees. On 11th February 1911 when the period of 12 years was about to expire within which it was necessary that the decree should be executed, if anything remained still to be paid, the present application was made, and again the same false statement was made by the plaintiff. This time, however, he had to pay the fees and appellant received notice of the application. The execution has been ordered by both the trial Court and the District Court by reason of the provisions of para. 3, O. 21, R. 2, which corresponds to the old S. 258. The trial Court came to a definite conclusion that in the application which it granted the judgment-creditor was trying to obtain, and was in fact obtaining fraudulent execution of his decree which

had already been satisfied. The Assistant Judge in the District Court came to the conclusion that, whether or not the payment had been actually made, it was not necessary to determine, although there was evidence on the record on the point, because by reason of O. 21, R. 2, the Court could not recognize the payment or adjustment.

This question has already been considered in this Court in the case of *Trimback Ramkrishna v. Hari Laxman* (1), in which the judgment of my learned colleague gives cogent reasons for holding that the Court should not in the exercise of its duty under S. 244 allow a clear case of fraud to be covered and condoned by the provisions of S. 258 or O. 21, R. 2. It appears to us that the provisions of O. 21, R. 2, Cl. (e), which have been brought to our notice by counsel for the appellant, strongly confirm the conclusion indicated in the case referred to. A fraud, as is admitted in argument by the pleader for the respondent, has, if the findings of the first Court are upheld in appeal, been clearly committed upon the Court in the application for execution by reason of the false statements made by the judgment-creditor, and we cannot permit a litigant by means of proved false statements to obtain an unjust order from the Court in execution. We, therefore, set aside the decree of the District Court and remand the case for trial on the question whether the payment was actually made or not as found by the trial Court and for disposal of the application with reference to the remarks in this judgment. Costs will be costs in the appeal.

G.P./R.K.

Case remanded.

1. (1910) 34 Bom 575=7 I O 940.

A. I. R. 1916 Bombay 218

BATCHELOR AND SHAH, JJ.

Bakir Saheb Amir Saheb—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 578 of 1915, Decided on 18th February 1916, from conviction and sentence of Asst. Judge, Thana.

Criminal P. C. (1898), Ss. 476 and 477—Person has no right to cross-examine witnesses during inquiry under S. 476 against him—Trial started on result of such inquiry—Witnesses not forthcoming—His previous

statement in inquiry case is not admissible—Evidence Act (1872), S. 33.

The person against whom proceedings have been instituted under S. 476, Criminal P. C., has not the right to cross-examine witnesses during the inquiry under the said section. Therefore, if a witness is not forthcoming at the trial that is started on the result of such inquiry his previous statement is not admissible under S. 33, Evidence Act. [P 219 C 2]

Per *Batchelor, J.*—It is open to a Court to make an order under S. 476, without taking any evidence at all. If it chooses to take evidence it is entirely within its discretion to say when and where that evidence should stop. The section gives the widest discretionary power to a criminal Court and deliberately refrains from imposing any special formalities to hamper the discretion of the Court: 4 I C 273 and 16 I C 497, *Foll.* [P 219 C 1]

Per *Shah, J.*—The scope of the inquiry under S. 476 depends on the discretion of the Court. It is optional to the Court to make a preliminary inquiry and the nature of that inquiry must be determined with reference to the circumstances of each case. If a witness be examined in the course of such inquiry, it cannot be said that it is the right of the person against whom the inquiry is being made, to cross-examine the witness. There is nothing either in S. 476 or S. 477 to suggest that the person concerned has any such right. [P 220 C 1]

Binning and M. M. Karbhari—for Accused.

S. S. Patkar—for the Crown.

Batchelor, J.—The first point taken in this appeal is a question of law which arises in this way: The appellant Bakir has been convicted of making a false charge against one Aliser. The appellant had alleged that this Aliser had stolen a thousand rupee note from him. Aliser was convicted by the Magistrate in regard to this theft, but the conviction was set aside on appeal by the learned Sessions Judge. After setting aside the conviction, the Sessions Judge entered upon an inquiry for the purpose of ascertaining whether such proceedings as these should not be instituted against the then complainant, Bakir. Ultimately the Sessions Judge ordered Bakir to be committed for trial on the charge of making a false charge of theft. In the inquiry which preceded the commitment, the learned Judge took the statement of Aliser among others. Aliser has now disappeared, and his evidence could not be obtained in the Court of Session. Therefore, the learned Assistant Judge, by whom this trial was conducted, allowed upon the record the statement which Aliser had made to the Sessions Judge in the inquiry preceding the commitment of Bakir. As Aliser is

a very important witness, it is desirable to decide in limine whether this admission of his earlier statement is in conformity with law or not. Mr. Binning, contending for the negative, refers to S. 33, Evidence Act, under which alone the statement could be admissible and contends that one necessary condition laid down by S. 33 is not in this case satisfied; that is to say, in this case Mr. Binning argues that the present appellant, Bakir, had not the right to cross-examine Aliser in the inquiry before the Sessions Judge. Admittedly, unless Bakir had that right, Aliser's previous statement, which has gone upon the record, must be excluded. In my opinion Mr. Binning's objection is well founded.

Some attempt was made to suggest that the inquiry held by the learned Sessions Judge might be attributed to S. 477, Criminal P. C., so that the preceding inquiry should be regarded as a proceeding resulting in commitment with the result that all the usual requirements which are needed in inquiries terminating in a commitment should be observed. It appears to me however impossible to ascribe the inquiry to any section but S. 476. That is the section which the learned Sessions Judge himself quotes, and that section authorizes precisely the kind of inquiry which this is. S. 477 moreover makes no reference to any inquiry at all. If, then, the inquiry must be held to have been made under S. 476, it seems to me that the appellant, Bakir, had no right to cross-examine the then witness, Aliser. Certainly no such right is conferred by the section. Indeed, the section goes so far as to say that the inquiry is merely discretionary, for it may or may not be made; in other words, it was perfectly competent to the Sessions Judge to make the order which he finally did make without taking any evidence at all; and if he chose to take evidence, it appears to me that it was entirely within his discretion to say when and where that evidence should stop. I regard S. 476 as giving the widest discretionary powers to the criminal Court and as deliberately refraining from imposing any special formalities to hamper the discretion of the Court. The wisdom of that is obvious, because it is clear that grave danger of prejudice would be

incurred if the informal inquiry contemplated in S. 476 were to be expanded and formalized into an investigation which would be practically a trial.

The view which I take seems to me to receive countenance from the decisions of this Court in *Safurabai v. Abdullabhai* (1) and *In re Karvirappa* (2). It may be added that the principle or reason of the thing is in favour of Mr. Binning, since the general rule undoubtedly requires that a witness should be produced if his evidence is to go upon the record, and the particular exceptions allowed by S. 33 are not, in my opinion, to be extended without very good cause. [After discussing the evidence his Lordship proceeded to observe as follows] On the whole therefore it appears to me that this conviction must be reversed, both because the direct positive evidence in its favour is too slight and fragmentary and because such corroboration as the circumstances afford is insufficient to justify a conclusion of the appellant's guilt. I would therefore allow the appeal, reverse the conviction and sentence and direct that the accused be acquitted and discharged.

Shah, J.—I agree that the statement of Aliser taken in the course of the inquiry before the Sessions Judge, which resulted in the commitment of the present appellant, is inadmissible in evidence. Its admissibility depends upon the answer to be given to the question, whether the present appellant had the right to cross-examine the witness within the meaning of the proviso to S. 33, Evidence Act, when his statement was recorded by the Sessions Judge. In my opinion, in those proceedings, the present appellant had not the right to cross-examine Aliser. Those proceedings were taken under S. 476 and the order was made under S. 477. The inquiry held on that occasion must, in my opinion, be referred to S. 476. The order of commitment, no doubt, is made under S. 477, Criminal P. C., which makes no provision for any inquiry; and the learned Sessions Judge has stated in the beginning of his order that the inquiry was made under S. 476 with a view to see whether an order under S. 477 could be made. It seems to me that the scope

1. (1909) 4 I C 273.

2. (1912) 16 I C 497.

of the inquiry under S. 476 depends upon the discretion of the Court. It is optional to the Court to make a preliminary inquiry, and the nature of that inquiry must be determined with reference to the circumstances of each case. Under these circumstances it seems to me that even if a witness be examined in the course of such an inquiry, it cannot be said that it is the right of the person, against whom the inquiry is being made, to cross-examine the witness. Of course, ordinarily a witness would be allowed to be cross-examined, and I do not for a moment suggest that it would be anything but proper for the Court to allow a witness to be cross-examined by the adverse party. But the question as to whether the person against whom the inquiry is proceeding, has the right to cross-examine a witness is quite different. There is nothing either in S. 476 or S. 477 to suggest that the person concerned has any such right.

I only desire to say a word as to the observations in the judgment of this Court in the application made by the present appellant against the order of commitment, upon which the learned Government Pleader has relied. It is argued by him that the judgment shows that the inquiry held in this case must be deemed to have been held under S. 477 and that it could not now be properly treated as an inquiry under S. 476. In the first place, it seems to me that the observations do not support his contention. They were made with reference to the argument then advanced on behalf of the applicant that the inquiry was not under S. 476 but must be referred to S. 477, and that there being no provision in S. 477 with regard to any inquiry, the whole inquiry was illegal. It was not necessary then to decide whether the proceedings held by the Sessions Judge were in fact under S. 476, Criminal P. C. Secondly, if the inquiry cannot be properly treated as having been made under S. 476, it is clear that there is nothing in S. 477 to regulate the inquiry which results in an order of commitment under that section, and to support the contention that the party against whom the inquiry is held has a right to cross-examine any witness examined in the course of that inquiry. I agree generally with the reasons given by my learned brother for the conclusion

that the conviction and sentence must be set aside.

On a careful consideration of the arguments on both sides, the conclusion that I have come to is that though there is no reason to doubt the correctness of the acquittal of Aliser, there is not sufficient material on the record to justify an inference as to the guilt of the present appellant on either charge. It seems to me that there is room for a reasonable doubt as to the guilt of the appellant and the benefit of that doubt must be given to him.

G.P./R.K.

Order accordingly.

A. I. R. 1916 Bombay 220

BATCHELOR AND SHAH, JJ.

Anna Laxman Bhintade—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Appln. for Revn. No. 395 of 1915, Decided on 9th March 1916, from conviction and sentence of First Class Magistrate, Wai.

Penal Code (1860), S. 429—Maiming an animal—Nearly one-half of one ear cut off without impairing sense of hearing—Injury does not amount to maiming.

The word "maiming" in S. 429, involves the notion of the privation of the use of some limb or member involving a permanent injury and not a mere disfigurement.

Where nearly one-half of one ear of an animal is cut off without impairing its sense of hearing, the injury does not amount to "maiming"

[F 221 C 1]

K. H. Kelkar—for Applicant.

Batchelor, J.—In this case the applicant has been convicted, under S. 429, I. P. C., of the offence of maiming a mare.

The maiming alleged consists in this that nearly one-half of one ear of the mare was cut off by the applicant. There is no suggestion that the animal's sense of hearing has been impaired. The question is, whether such an injury amounts to maiming within the meaning of S. 429, I. P. C. Having regard to the position of the word "maiming" in that section, where it occurs in conjunction with the words "killing, poisoning or rendering useless," I am disposed to think that the "maiming" of the section implies some permanent disability inflicted on the animal. I do not seek to give an exhaustive definition of the word "maiming." But it appears to me that in-

involved in the word is the notion of the privation of the use of some limb or member involving a permanent injury, and not a mere disfigurement. That view is, I think, in accordance with Phillips, J's. decision in *Marogowdha v. Srinivasa Rangachar* (1), where the record shows that both the ears of the animal were removed and the hearing had been permanently impaired. In *Reg v. Jeans* (2) the facts were that the prisoner pulled out part of the tongue of a horse. It was argued that that did not constitute maiming, because the injury inflicted was only of a temporary character, whereas in maiming the injury must be permanent. Wightman, J., having consulted with Patterson, J., allowed this argument, saying that there was no such permanent injury inflicted on the animal as would support the count for maiming. So also in Stroud's Judicial Dictionary the word is defined as

"a bodily harm whereby a man is deprived of the use of any member of his body, or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened."

In Murray's Dictionary the word is defined as

"an injury to the body which causes the loss of a limb or of the use of it,"

or more widely as "any lasting wound or injury." The word occurs in the English Malicious Damage Act, 1867, 24 & 25 Vic., c. 97, S. 40, and in Russell on Crimes, Vol. 2, p. 1827, 7th Edn., where *Reg v. Jeans* (2) is cited, it is stated in commenting upon the statute that

"to constitute a maiming, a permanent injury must be inflicted on the animal."

In this case there is no permanent injury but a mere disfigurement, and I am of opinion therefore that the case does not fall under S. 429, I. P. C. The conviction must be altered to a conviction under S. 426 and the sentence must be reduced to a term of three months' rigorous imprisonment. Since the applicant has already suffered this term of imprisonment, we order him to be discharged and set at liberty.

Shah, J.—I am of the same opinion.

G.P./R.K.

Order accordingly.

1. (1912) 35 Mad 594=12 I C 90.

2. (1844) 1 Car & K 539.

A. I. R. 1916 Bombay 221

BEAMAN AND HEATON, JJ.

Rama Bapu Pujari and another—Applicants, In re.

Criminal Revn. Appln. No. 154 of 1916, Decided on 17th August 1916, against an order of Dist. Magistrate, Sholapur.

Criminal P. C. (1898), S. 514—Death of accused by suicide—Sureties are discharged—Mistaken admission that accused are alive does not prevent discharge.

On the death of an accused person by suicide before the date fixed for his appearance, the sureties are discharged from liability and they cannot be penalised in the forfeiture of their bonds by reason of their mistaken admission that he was alive. [P 222 C 1]

Per *Beaman, J.*—The object of the surety-bonds is, as far as possible, to ensure that an accused person shall not evade justice in the ordinary sense, that is to say, by flying the country or the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts. [P 221 C 2; P 222 C 1]

P. V. Kane—for Applicants.

S. S. Patkar—for the Crown.

Beaman, J.—The man for whom the two applicants stood sureties was to have been tried on the 19th. He was found dead on the 24th. No one knows the date of his death. But both Magistrates are of opinion that the cause was suicide. We see no reason to conclude that he must necessarily have died after the 19th. There is a medical affidavit to the contrary and the District Magistrate most certainly ought to have given careful attention to this point. But in any event we can find no sufficient ground for penalising the sureties in a case of this kind. Even if the accused person had only committed suicide on the 19th or 20th, it is clear that he must have had that act in contemplation and that was the only reason why he did not present himself for trial. To call in surety-bonds in circumstances of that kind appears to us to evidence a complete lack of discretion, and we think it might also tend to bring our administration on that point into general disrepute. Surely the object of these surety-bonds is, as far as possible, to ensure that the accused person shall not evade justice in the ordinary sense, that is to say, by flying the country or the jurisdiction of the Court. But if he

elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts.

We think therefore that the order of the District Magistrate should be set aside and the amount of these bonds, if it has been recovered, should be refunded to the sureties.

Heaton, J.—I concur. On the proceedings as they are before us, what was known to the Court at the time that it made the order penalising the sureties was that the accused person had died, and that the two sureties admitted that he had not died until after 19th November. That was the date on which he ought to have appeared, but did not. The record does not suggest that these sureties had any personal knowledge whatever of the death of the accused. It was represented by a police officer that the accused had committed suicide. The sureties accepted that fact apparently and came to the conclusion that he must have committed suicide after the 19th. That however so far as I can see from the record is pure conjecture. I should have thought, that being so, that if the Magistrate had contemplated exacting the penalty from these sureties, he would have at least taken the precaution of ascertaining or attempting to ascertain when it was that the accused had actually died. He did not do so. He acted on the admission of the sureties themselves who apparently had no personal knowledge whatever. That seems to me to be a very harsh proceeding on the Magistrate's part and one that I feel ought to have been corrected by the District Magistrate when the matter came before him. We have now corrected it.

G.P./R.K.

Order set aside.

A. I. R. 1916 Bombay 222

BACHELOR AND SHAH, JJ.

Emperor

v.

Sanjiva Shivapa Bader—Accused.

Criminal Ref. No. 94 of 1915, Decided on 29th November 1915, made by Dist Magistrate, Bijapur.

Bombay Public Conveyance Act (1863), S. 2—To use in licensed tonga licensed pony is no offence though pony does not bear number of tonga.

There is no provision of the Act which requires that a particular pony or ponies should be yoked to a particular tonga or that the ponies used should be branded with the number of a particular tonga. To use in a licensed tonga a licensed pony, even if the pony does not bear the number of the tonga, is no offence. [P 222 C 2]

S. S. Patkar—for the Crown.

Judgment.—In this case we agree with the District Magistrate that the conviction is unsustainable. All that the accused did was to use in a licensed tonga a licensed pony, though the licensed pony did not bear the number of the tonga. The accused has been convicted under S. 2, Bombay Public Conveyances Act. The learned Magistrate who convicted the accused appears to have thought that to ply a tonga with a pony, licensed generally but not licensed for that particular tonga, fell within the words of S. 2, which prohibits the keeping or letting for hire of any public conveyance without the license referred to in the section. But there is no provision of the Act which requires that a particular pony or ponies should be yoked to a particular tonga or that the ponies used should be branded with the number of a particular tonga. Under S. 1 of the Act "public land conveyance" is defined as the carriage by whatever number of horses or other animals it may be drawn. In *Emperor v. Hari Tanaji* (1) the accused, who had yoked an unlicensed pony to a licensed conveyance and plied the conveyance for hire, was held to be punishable under S. 2 of the Act; but that was because, in the words of the judgment, "the accused has plied his tonga with another pony which was not licensed, that is, with motive power which has not been approved."

In this case the motive power had been approved, and there is nothing in the Act or the rules thereunder which required the accused to restrict the use of a licensed pony to any particular conveyance. We therefore set aside the conviction, direct that the accused be acquitted and discharged and that the fine, if paid, be refunded to him.

G.P./R.K.

Conviction set aside.

A. I. R. 1916 Bombay 223

BATCHELOR AND HAYWARD, JJ.

Bhaskar Gopal and others—Defendants—Appellants.

v.

Padman Hira Chowdhari—Plaintiff—Respondent.

Second Appeal No. 177 of 1914, Decided on 11th October 1915, from decision of First Class Sub-Judge, Thana, in Appeal No. 308 of 1911.

(a) **Transfer of Property Act (1882), S. 54**
—Property conveyed in possession of tenants
—Sale is only of reversion—Registration is necessary though value be less than Rs. 100.

Section 54 draws a sharp distinction between tangible immovable property and a reversion or other intangible thing.

Where the property transferred is in the possession of tenants, the interest conveyed is only a reversion in the property and therefore the sale-deed demands registration even though the property be of a value less than one hundred rupees.

[P 223 C 2]

(b) **Transfer of Property Act (1882), S. 54**
—“Reversion”—Meaning explained.

A “reversion” is the undisposed of interest in land which reverts to the grantor after the exhaustion of any particular estates, such as an estate for years, or life or in tail, which he may have created.

[P 223 C 2]

P. B. Shingne—for Appellants.

A. G. Desai—for Respondent.

Batchelor, J.—The suit in which this appeal arises was brought in ejectment, and the plaintiff made title on a registered sale-deed executed to him in 1910 by the widow and daughters of Rama, the original owner of the property. The defendants resisted the suit on the ground that they were tenants of Rama prior to the year 1909 and that in the year 1909 the property was sold to them for Rs. 50 by Rama's widow. Admittedly this sale-deed was not registered, but the defendants' contention was that no registration was necessary, since the value of the property was under Rs. 100. The lower appellate Court has decided in the plaintiff's favour, relying upon the case of *Sibendrapada Banerjee v. Secy. of State* (1), where a certain parcel of land, having been transferred to the Public Works Department for a sum less than Rs. 100 without any registered instrument, the Secy. of State sued the defendants to recover possession of the land, and, upon objection taken that the plaintiff acquired no title to the property inasmuch as the transfer upon which he

1. (1907) 34 Cal 207.

relied contravened S. 54, T. P. Act, the Court held that since the transfer was not made by registered instrument and since the plaintiff had been in prior occupation, there could not be said to have been any delivery of possession within the meaning of S. 54, T. P. Act, and the plaintiff consequently acquired no title by the transfer. No specific reasons are however given by the learned Judges for this decision, which I have some difficulty in following. It is not however necessary for me further to consider the authority of this case because, on another ground, I think that the defendants-appellants must fail.

Section 54, T. P. Act, provides that, in the case of tangible immovable property of a value less than Rs. 100, transfer by way of sale may be made either by a registered instrument or by delivery of the property. But the section draws a sharp distinction between tangible immovable property and a reversion or other intangible thing. The defendants contend that the thing sold to them was the tangible house, which indeed purported to be the object of the sale. But it is clear that the vendor could not sell any higher interest than she possessed, and as at the date of the sale she had transferred possession to the defendants who were in possession as her tenants, I am of opinion that the only interest which remained in the vendor was the reversion within the meaning of that term as used in S. 54. That, so far as I am aware, is the only interest in the property which remains with a landlord after he has leased the immovable property to tenants and has made over possession to them. The word is used in this sense in Woodfall's Law of Landlord and Tenant and also in Lord Halsbury's Laws of England, Vol. 18, Para. 766, under the title “Landlord and Tenant.” This use is in conformity with the definition contained in Stroud's Judicial Dictionary where a “reversion” is described as

“the undisposed of interest in land which reverts to the grantor after the exhaustion of any particular estates, such as an estate for years, or life or in tail, which he may have created.”

I think therefore that in this case as the sale was in law a sale of a reversion, it could, under S. 54, T. P. Act, be effected only by a registered instrument. That being so, there was no legal sale to

the defendants and the lower Court was right in decreeing the plaintiff's suit.

This appeal therefore in my opinion fails and is dismissed with costs.

Hayward, J.—The plaintiff sought to recover possession of certain land as the purchaser from the owner by a registered sale-deed. The defendants alleged that they had been in possession as tenants from the owner and pleaded that they had subsequently on payment of a sum less than Rs. 100 obtained delivery of further possession as owners in virtue of a prior unregistered sale-deed. The plaintiff succeeded in his suit in first appeal, where it was held that the defendants had not received delivery of possession as owners, following the case of *Sibendrapada Banerjee v. Secy. of State* (1), and that without such delivery of possession there could be no valid transfer of ownership by the prior unregistered sale-deed in view of the provisions of S. 54, T. P. Act. It has been argued on second appeal on behalf of the defendants that they did receive delivery of possession as owners and, therefore obtained a valid transfer notwithstanding the invalidity of the attempted transfer by the unregistered sale-deed contrary to the provisions of S. 54, T. P. Act,

It seems to me important to consider closely what it was that was alleged to have been delivered into the possession of the defendants. They alleged, as already stated, that they had actual possession of the term or tenancy and pleaded in effect that they had further received a symbolical possession of the interest remaining in their landlord, that is to say, that they had received possession of the reversion. If authority be required for the proposition that that interest was a reversion, reference may be made to Woodfall's Landlord and Tenant passim and Halsbury's Laws of England, Vol. 18, in para. 766. It is plain that actual possession can be given in the case of a term or tenancy to tenants, as that involves transfer of tangible immovable property. But on the other hand symbolical possession alone can be given in the case of the right to possession at the end of the term or tenancy vested in the landlord, i. e., of the landlord's reversion, as that involves transfer of intangible immovable property. No doubt a valid transfer can

be effected for less than Rs. 100 by delivery of actual possession without a registered instrument in the case of tangible immovable property. But the question here is, whether a valid transfer could be effected for less than Rs. 100 by delivery of symbolical possession without a registered instrument in the case of a reversion or tangible immovable property. It is not impossible to deliver symbolical possession. Such delivery is familiar in law, and it is difficult to follow the arguments of the learned Judges in the case of *Sibendrapada Banerjee v. Secy. of State* (1). But is such delivery of symbolical possession recognized by law as a valid transfer? That depends on the interpretation of the terms of S. 54, T. P. Act.

Now a sharp distinction has there been drawn between the mode of transfer of tangible immovable property and the mode of transfer of a reversion or other intangible thing. Where the property is valued at less than Rs. 100 the transfer of the former, that is to say tangible immovable property, can be effected by delivery of possession or by means of a registered instrument. But in the case of the latter, viz., intangible immovable property, the transfer can be effected solely by registered instrument. No doubt the reason was to avoid unnecessary obstacles in the transfer of unimportant immovable property where delivery of actual possession would afford patent evidence of the transfer. It was apparently not considered necessary in such cases to insist on the formalities of registered instruments. Where however the delivery would be a disputable fact, as where symbolical possession alone would be possible, then apparently it was considered necessary to insist on a registered instrument in the case even of unimportant immovable property. Here the transfer attempted was a transfer of a reversion or other intangible thing, and although that reversion was valued at under Rs. 100, the transfer could be effected only by a registered instrument. There was in this case no such registered instrument. Therefore the transfer was invalid by reason of the provisions of S. 54, T. P. Act.

We ought therefore in my opinion though for somewhat different reasons from those given by the learned Judge

of first appeal, to confirm the decision of the lower appellate Court and to dismiss this second appeal with costs.

G.P./R.K. *Decree confirmed.*

A. I. R. 1916 Bombay 225

BEAMAN, J.

Kanji Jethsi and another—Plaintiffs.

v.

Advocate-General and others—Defendants.

Original Suit No. 95 of 1913, Decided on 7th September 1915.

Cypres Applicability of doctrine—Court has no jurisdiction to apply doctrine extra territorium.

Where objects of a charity lie without the jurisdiction of a Court, the most the Court can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are. [P 226 C 1]

A Court has no jurisdiction to apply the cypres doctrine extra territorium. [P 226 C 2]

Where a Court has by its decree so applied the doctrine a Court of concurrent jurisdiction is competent to vary the decree as passed and to direct application of the funds to the intended objects within the limits of the country where those objects are, and should there be no scope for those uses, to leave to the Courts of the same country on the cypres doctrine to divert the funds to other like charitable uses. [P 226 C 1]

Desai and Kanga—for Plaintiffs.

Taraporewalla, Taleyarkhan, Jinnah, Bahadurji, Wadia and Davar—for Defendants.

Judgment.—No issues are raised in this suit because none of the parties are disposed to take up a contentious attitude. The position with which I am confronted is certainly very unusual. In form the present suit may be defective. I think that the relief that is asked for is too large. I do not think that I am in a position, or have jurisdiction, to set aside the decree of a Court of concurrent authority. Nevertheless the plaintiffs are suffering what appears to be a substantial injustice and there must be some remedy.

It appears that a Jain of some wealth died, bequeathing considerable sums of money to two charities. The first of these was merely described as Jiva Daya, that is, in the ordinary sense, the feeding of animals or insects. The other half was the bestowal of clothes and food upon sadhus and sadhavis, shra-vaks and shravikas within the territo-

rial limits of the State of Palitana, and doubtless according to the intention of the testator, while performing the sacred pilgrimage to the temples on Satrinja. In 1910 an originating summons was taken out before Robertson, J. The trustees were the plaintiffs. The Advocate-General was made a defendant and so were four members of the Jain community, one residing in Bombay, one in Poona, one in Cutch and one in the State of Palitana. It is quite clear that this originating summons was not a suit under S. 92, Civil P. C. It is also quite clear that the four Jain defendants were not representing the intended beneficiaries under O. 1, R. 8. But it is not at all clear what this rather heterogeneous array of parties really meant or what it conveyed to the learned Chamber Judge. The Advocate-General merely submitted to the decision of the Court and appears to have taken no interest whatever in the subject-matter of the summons. Affidavits were put in by the Jain defendants supporting the suggestion of the trustees that the designated objects of the testator's bounty were already amply supplied, and that as regards the first half of the charitable bequests, the meaning of the words "Jiva Daya" might and ought to be extended so as to include benefits to the soul, of which not the least was primary education. Accordingly the learned Chamber Judge made an order directing the trustees to apply all the funds at their disposal cypres to a certain local educational institution situated in Bombay.

The present plaintiffs have come in under O. 1, R. 8, as representing the intended beneficiaries in the territorial limits of the State of Palitana. We have now the Advocate-General, the trustees of the charity and the trustees of the local school amongst the defendants and there is defendant 7, who has taken up a position of his own and claims that the interpretation put upon the words "Jiva Daya" in the proceedings before Robertson, J., was entirely wrong and that that learned Judge's order has, through the incorrect information supplied by these affidavits, wholly misapplied that part of the charity. The difficulty which I have felt throughout lies in the fact that there is a decree, in form, seemingly a decree in rem, of a Court of co-ordinate

authority and concurrent jurisdiction, directing the trustees to apply the entire funds of this charity to a particular local object. With respect, I am clearly of opinion that had the matter been properly represented by the Advocate-General to the learned Judge sitting in Chambers, he would have seen at once that touching, at any rate, so much of the charity as was in the plainest and most unmistakable language intended to be given within the limits of foreign territory it was not competent for him, applying the cy pres doctrine, to divert the charitable funds from their destined object to a totally different object within the jurisdiction of his own Court. The principle has long been established and is perfectly well settled in the English Courts that where the charitable objects lie without the jurisdiction of the Courts the most the Courts can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are.

If that principle had been represented to Robertson, J., he could hardly have taken upon himself, as a Judge on the Original Side of this Court, the territorial jurisdiction of which is restricted to the town and island of Bombay, to determine, first, upon the question whether certain charitable objects in the State of Palitana were or were not already sufficiently supplied, and assuming that they were, then, on the cy pres doctrine to divert the funds to other like charitable uses. That is clearly a matter for the Courts of the State of Palitana and one lying wholly without the jurisdiction of the Original Side of this Court. The case in its present development is very much the same as that in which this Court may have construed a will in such a way as to direct the executors to distribute all the funds to named persons and thereafter a suit be brought by a legatee who was not a party to those proceedings proving that he himself was entitled to the money in the hands of the executors. In such a case notwithstanding the decree of the first Court, a Court of concurrent jurisdiction might, and indeed

in my opinion ought to, make a decree in the second suit which would necessarily operate to modify, if not wholly annul, the decree first made. So here the result of Robertson, J.'s decree has been to deprive the intended beneficiaries residing within the limits of the Palitana State of the bounty intended to be conferred upon them by the founder of this charity. They were no parties to the proceedings in which that decree was made. It is contended that the Advocate-General was a party and that the Advocate-General represents all charities. That is true, and that is a point which has occasioned me the most difficulty. But for the purposes of such a matter as was under the consideration of Robertson, J., it may be thought that the functions of the Advocate-General were restricted to safeguarding the funds within this Court's jurisdiction. Certainly the Advocate-General seems to have made no attempt to protect the interests of the intended objects of the testator's bounty. Nor did the Advocate-General point out, as he well might have done, at the time that the learned Judge had no jurisdiction to apply the cy pres doctrine extra territorium.

In these circumstances and keeping in view the considerations I have briefly outlined, I think that I shall be within my competence in so far as varying the decree made on the Chamber summons as to direct that the trustees shall expend half the charitable funds in their hands upon the purposes for which they were intended, that is, the feeding and clothing of sadhus and sadhavis and shravaks and shravikas in the Palitana State; and should there be no scope for these uses, then it will be for the trustees to apply to the Courts of the Palitana State for directions as to the manner in which the funds in their hands may best be applied cy pres. As to the other half of the charity, it is not contended that it has been limited definitely to any locality, and therefore I cannot say that the order of Robertson, J., in dealing with so much of it was without jurisdiction, or that I have any authority, whatever my own opinion may be, as to the correctness of his application of the cy pres doctrine to the matter before him, to interfere in any way in this suit with so much of the decree he

passed upon the Chamber summons. Decree will now be drawn in the suit directing the trustees to apply half the charitable funds in their hands to the purposes I have mentioned, that is to say, feeding and clothing of the sadhus, etc., in the Palitana State, or should it appear that the money cannot be usefully so expended, then to apply to the Courts of the Palitana State for directions how best to apply it *cy pres*. The costs of all parties to this suit may come out of the charitable funds, those of the Advocate-General and defendants 2 and 3 as between attorney and client and of the plaintiffs and defendants 4, 5 and 7 being party and party costs.

G.P./R.K. *Order accordingly.*

A. I. R. 1916 Bombay 227

MACLEOD, J.

Sewaram Gokaldas and others—Plaintiffs.

v.

Bajrangdat Hardwar Potdar — Defendant.

Original Civil Suit No. 875 of 1915, Decided on 20th September 1915.

(a) **Civil P. C. (1908), S. 20 — Hundi executed for balance of amount due in respect of certain transactions — Suit on Hundi—Transactions do not form part of cause of action.**

A hundi was executed at Bassum. The consideration for it was the balance of account due in respect of transactions effected in Bombay. The hundi was not made payable at Bombay. In a suit on the hundi:

Held: that the Courts at Bombay had no jurisdiction and that it was not necessary to prove the transactions out of which the claim arose as the claim on those transactions was satisfied by the passing of the hundi, and thus the transactions did not form a part of the cause of action in the case. [P 227 C 2]

(b) **Letters Patent (Bombay) (1908), Cl. 12 — Suit on Hundi — Money not payable in Bombay—Leave will be refused.**

Under Cl. 12, in suits on hundis, leave will be given when the money is payable in Bombay and when it is not payable in Bombay, leave will be refused. [P 227 C 2]

Strangman—for plaintiffs.

Desai—for Defendant.

Judgment.—The plaintiffs, carrying on business in Bombay, had dealings with the defendant, who is said to carry on business at Bassum in Akola under the style of Chatandas-Shankardas. The plaintiffs say that the account was settled in 1912 between the parties. The defendant, after paying a certain amount in cash, passed two hundis for Rs. 900

and Rs. 1,000, respectively, drawn on his own firm by the defendant payable in Bombay 181 and 361 days after sight, respectively. As those hundis were not met when they fell due, the plaintiffs brought this suit for the recovery of the amount. Para. 5 of the plaint states that the defendant resides at Bassum; that the hundis were passed at Bassum but the consideration of the hundis was the balance of the account due by the defendant to the plaintiffs in respect of transactions effected in Bombay and the moneys were payable to the plaintiffs in Bombay and a material part of the cause of action arose in Bombay. Leave was obtained under Cl. 12 of the Letters Patent to file the suit in Bombay. The question has now arisen whether any part of the cause of action has arisen within the local limits. It must be admitted, on an inspection of the hundis that the statement in the plaint that the hundis were payable in Bombay is incorrect. But it is contended that the consideration for the hundis was the balance of account due by the defendant to the plaintiffs in respect of transactions effected in Bombay.

The question is whether that was a part of the cause of action. The point apparently does not seem to have arisen before; but if the whole cause of action consists of those facts which it is necessary for the plaintiffs to prove in order to succeed in getting a decree, then it was not necessary to prove the transactions out of which the present claim arose, as the claim on those transactions was satisfied by the passing of the hundis and under the Negotiable Instruments Act the consideration for the hundis must be presumed, so the plaintiffs are entitled to a decree merely on production of the hundis unless the defendant can show that there was no consideration. In giving leave under Cl. 12 of the Letters Patent in suits on promissory-notes or hundis, I have always given leave when the money was payable in Bombay and refused leave when the money was payable out of Bombay; and, in my opinion, if there are transactions in Bombay, which result in a credit in favour of the Bombay merchant against an up country merchant, and if the Bombay merchant goes to settle his account up country and accepts a promissory-note or hundi in satisfaction of his ac-

count, then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay.

Unfortunately, the 'plaintiffs when they applied for leave, made a misstatement in the plaint upon which I relied in granting the leave. If I had been aware that the facts stated in the plaint were incorrect, I should have refused the leave. Therefore, I must hold now that the Court has no jurisdiction. The plaint should be returned to the plaintiffs for presentation in the proper Court. The plaintiffs to pay the defendant's costs.

G.P./R.K.

Plaint returned.

A. I. R. 1916 Bombay 228

SCOTT, C. J. AND HEATON, J.

Dattatraya Ramchandra Savale and others—Plaintiffs—Appellants.

v.

Ajmuddin Fakruddin and others—Defendants—Respondents.

First Appeal No. 244 of 1913, Decided on 15th December 1915, from decision of Asstt. Judge, Ratnagiri, in C. S. No. 127 of 1912.

Civil P. C. (1908), S. 97 — Preliminary decree—Appeal against is not after final decree permitted.

Section 97 does not in terms prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so. [P 228 C 2]

Where therefore the appellant instead of appealing against the final decree, appeals against the preliminary decree, the course is unreasonable, and the appellant will not be permitted to avoid the provisions of the Court-fees Act by getting what may or may not be an effective reversal of the final decree by a circuitous method when the direct method is open to him. [P 229 C 1]

D. A. Tulzapurkar—for Appellants.

Coyajee, S. Y. Abhyankar and D. C. Virkar—for Respondents.

Judgment.—The dates in this case are as follows: On 30th July 1913, a preliminary decree was passed in a mortgage suit. On 25th August 1913, a final decree was passed by which the appellant was required to pay Rs. 8,000. On 6th November 1913 he preferred this appeal against the preliminary decree only, although his objection is as regards Rs. 2,000 of the amount which he was required to pay by the final decree. The dates clearly permit him to raise objection in one and the same appeal to both the decisions of the Court in the

preliminary decree and the decision in the final decree. If at the time of the appeal he had only in his way the preliminary decree, he would have to pay a court-fee of Rs. 10. Having however already a final decree in his way, he would have, in order to appeal against the decree which he really objects to, to pay a court-fee exceeding Rs. 100; so that the reason of his action is pretty obvious. He is trying to avoid payment of the court-fee upon the final decree which he objects to. A similar case came before this Court: see *Balwantsingh Ramchandra v. Sakharan Mancharan* (1) in which, on similar facts, the Court observed that where the appellant instead of appealing against the final decree appeals against the preliminary decree, the course is unreasonable, and S. 97, Civil P. C., does not in terms prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so. In that case the Court permitted the appellant to have a reasonable time to combine objections to the final decree in the pending appeal, paying such court-fees as might be necessary, and an adjournment was granted for the purpose. We follow the decision in that case and we pass similar order. But before concluding it is necessary to refer to two judgments in the Madras and Allahabad High Courts which have been relied upon by the appellant. *Lakshmi v. Marudevi* (2) was a case arising upon different facts altogether. *Kanhaiya Lal v. Tirbeni Sahai* (3) contains a passage to this effect—

"It seems to me" says the learned Chief Justice, "that these remarks in *Kuria Mal v. Bishambhar Das* (4), namely 'that a serious anomaly would be created by the modification of the preliminary decree . . . while the final decree . . . remained in force and had not been appealed against', proceeded upon the erroneous assumption that the final decree remained in force after the preliminary decree upon which it was based had been set aside. In my opinion, in a suit for partition, when the preliminary decree is set aside on appeal, the final decree which is based upon it falls to the ground. If I am right in this, there is no foundation for the supposed anomaly which the learned Chief Justice apprehended. It has been held by the Calcutta High Court, that the final decree continued after the preliminary decree had been set aside,

1. A I R 1916 Bom 202=33 I C 137.

2. A I R 1915 Mad 197=12 I C 664=37 Mad 29.

3. A I R 1914 All 380=24 I C 827=36 All 532.

4. (1910) 32 All 225=5 I C 276.

but all these decisions proceeded on the basis that a party could challenge the correctness of the preliminary decree on an appeal from the final decree. The provision of the Code to which I have referred above now sets this matter absolutely at rest. A party to a suit for partition who has not appealed against the preliminary decree, can no longer challenge the correctness of that decree by an appeal against the final decree."

Here, as we have pointed out, the dates permitted the appellant to challenge both the preliminary decree and the final decree within the time allowed by law for appeal against the preliminary decree and we cannot permit him to avoid the provisions of the Court-fees Act by getting what may or may not be an effective reversal of the final decree by a circuitous method when the direct method is open to him. We therefore will permit the appellant two months within which to combine in this appeal such objections as he may have against the final decree, paying such court-fees as may be necessary. The appeal will be set down again in two months from this day when we will pass final orders if no objections have been added to the final decree.

G.P./R.K.

Order accordingly.

A. I. R. 1916 Bombay 229

BATCHELOR AND SHAH, JJ.

Govind Balvant Laghate—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 474 of 1915, Decided on 13th January 1916, from conviction and sentence of Addl. Dist. Magt., Ahmednagar.

Criminal P. C. (1898), Ss. 492, 495, 342 (4) and 343—Judge charged with receiving illegal gratification from *N* in respect of (1) horse and (2) and two hundis—Charges ordered to be tried separately—Pleader appointed to conduct prosecution before *N* was joined as co-accused—Horse case put up and Public Prosecutor withdrawing from prosecution of *N*—*N* assured that horse case against him would also be dropped if he gave truthful evidence—*N* discharged under S. 494—It was competent to Public Prosecutor to withdraw from case against accused subsequently joined—S. 342 (4) does not apply and objection to administering of oath to *N* was incompetent—Evidence of *N* was admissible though weight to be attached to it might be small—In so far as *N* was accomplice his evidence is to be tested in light of corroboration—Evidence Act S. 133 and S. 114 (b).

The accused, a first grade Subordinate Judge,

was charged with receiving illegal gratification from one *N* in respect of (1) a horse and (2) two hundis for Rs. 55 and Rs. 50, respectively. *N* was impleaded as a co-accused. By direction of the Court, the two charges were split and were ordered to be tried separately. A pleader was appointed to conduct the prosecution of the accused before *N* was joined as co-accused. The horse case having been taken up for trial, the Public Prosecutor withdrew from the prosecution of *N*. *N* received an assurance from the District Magistrate that if he gave truthful evidence, the hundi case against him would also be dropped. The Magistrate discharged *N* under S. 494. Objections were taken to the competency of *N* to give evidence under S. 343, and to the power of the Court to administer to him oath under S. 342 (4). It was also urged that the Public Prosecutor had no power to withdraw from the prosecution of *N*.

Held: (1) that the appointment of the Public Prosecutor was for the case and not with reference to any particular accused, and that the Public Prosecutor had every right to conduct the prosecution as against persons subsequently impleaded or to withdraw from the prosecution as against any of the accused. [P 321 C 2; P 235 C 2]

(2) that S. 342 (4), did not apply, as *N* was only a witness in the horse case that was then actually before the Court: 16 Bom 661; 23 Bom 213 and 25 Bom 422, *Foll.* [P 231 C 2; P 235 C 2]

(3) that as the inducement was offered to *N* only as a witness and not as an accused, the evidence of *N* was admissible, though that circumstance might materially affect the weight to be attached to his evidence: *Winsor v. Queen*, (1866) 1 Q.B. 390, *Ref.* [P 232 C 1, 2; P 235 C 2]

(4) that, in so far as *N* was an accomplice, his evidence should be tested in the light of what corroboration it received from other independent evidence. [P 230 C 1]

Section 342 (4), lays down the manner in which the Court is to examine an accused person then before it as an accused person, and the words "the accused" must be read as referring to the accused then under trial and examination by the Court. [P 231 C 2]

Per *Batchelor, J.*—S. 343, does not declare what would be the consequence if an accused person did make a statement under inducement. Where the inducement is offered to a discharged accused who is taken as a witness, the objection to his evidence is good only so far as it relates to his credit. This construction seems to be favoured by S. 118, Evidence Act, which suggests that, in India, the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration.

[P 232 C 1, 2]

An accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is important that the requirements of the Legislature in this respect should not be so exaggerated by

the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are, in their very nature, difficult of detection. When all legal precautions are taken and all relevant considerations are duly weighed, there remains the plain question whether the Judge or the Magistrate does or does not believe the particular accomplice. If, after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, it is his duty to say so and to give effect to his mental conviction. [P 233 C 1, 2]

Per Shah, J.—It is legally open to the Crown to withdraw from the prosecution of any particular accused, even if it be for the purpose of securing him as a witness in the case. Of course, it is for the Court, whose consent is necessary under S. 494, to exercise its discretion according to the circumstances of each case, and it is open to that Court to give or withhold its consent. [P 235 C 2]

Obiter.—There are no words in S. 343, to show that the prohibition contemplated by the section refers to the Court and not to any other person and that an "accused person" within the meaning of the section is the accused under examination and trial. A person who ceases to be an accused person in consequence of his discharge under S. 494 is a competent witness in the case against the other accused. [P 236 C 2]

There is a material difference between the position of a pardoned approver and the position of a witness to whom an inducement is given by the Crown that, if he speaks the truth, a separate charge against him would be withdrawn. In the one case the pardon is given openly to the knowledge of the parties and subject to the statutory conditions and limitations. In the other case, the fact of the inducement is known only to the party to whom inducement is given and to the party who gives the inducement and not to all the parties, not even to the Court, before the evidence relating to the inducement is given in the course of the trial. Besides the approver's liberty is subject to the control of the Court, whereas the liberty of the witness is in the hands of the party who is supposed to have held out the inducement. [P 237 C 1]

Velinkar, D. A. Kane and G. K. Chitale—for Accused.

Coyaji and S. S. Patkar — for the Crown.

Batchelor, J.—The arguments in this appeal have occupied us for more than three days. But so far from thinking that any part of that time was wasted, I am of opinion that the court is indebted to the learned counsel on both sides for the assistance which they have afforded us by their able and thorough-going arguments. In a case of this importance it is a matter of much satisfaction to feel sure that no point which could possibly be urged in the appellant's favour has passed unnoticed. The appellant is one Govind Balwant Laghate who, up to the time of his suspen-

sion in view of this prosecution, belonged to that excellent and deserving body of public servants, the Subordinate Judges. In that body he held a distinguished position, being a Subordinate Judge of the first class and drawing a substantial salary of Rs. 800 a month—a salary which, unless his mode of life was very extravagant, must have been more than sufficient for his needs. He has now been convicted of being a corrupt Judge. In more technical language he has been convicted under S. 161, I. P. C. of receiving an illegal gratification, that is to say, a bribe in respect of the discharge of the duties of his office as Judge. According to the case for the Crown the bribe took the form of the gift of a horse, which was presented to the appellant as a bribe by the witness Narayandas Kanhayalal, whose adoptive sister Mirabai had at the material times an important suit pending in the appellant's Court. Amidst much controversy there is one point upon which both sides seem agreed, and it is convenient to notice it now. I mean the patient and careful trial which the appellant had in the Court of the learned trying Magistrate, and the lucid and exhaustive judgment in which that Magistrate has discussed fully every point raised in argument and every material passage of the evidence on the record.

In my opinion, if the merits of this case can be arrived at, and especially, if the evidence of Narayandas Kanhayalal can be fairly considered, this appeal is hopeless. Whether because that was recognized by the appellant and his legal advisers or for some other reason unknown to me, it is the fact that the defence largely, if not mainly, was based on preliminary points of technical objection. I call them technical, because their object, either confessedly or manifestly, was to stave off a consideration of the merits of the case. Speaking for myself, I should have thought that a Judge accused—and, as he asserts, falsely accused—of corruption would have welcomed an opportunity of meeting that accusation on its merits in a criminal Court, where the onus of proof was entirely on his accusers. That however is not the course which this appellant has elected to adopt. The course which he has adopted is a course per-

fectly open to him. But I will say candidly for myself that unless forced by law to a different view, I should be slow to allow in such a case as this any technical objection to stand between this Court and the decision of the important question whether this appellant has or has not been proved to be corrupt. Now there were many points of technical objection raised in the Court of the learned Magistrate. Most of them have been abandoned, in this Court. There remain however two which, since they were pressed by Mr. Velinkar, must be considered and decided by us. Both these points arise upon the same set of facts which may be explained as follows :

The Government by Ex. 3 on the record sanctioned the prosecution of the appellant under S. 161, I. P. C., or such other section as might be found applicable. By the order, Ex. 7, Government appointed Mr. H. C. Coyajee and Khan Bahadur S. C. Davar, or either or both of them, to conduct this prosecution. In a schedule affixed to that order are set out the charges upon which the trial was to proceed, and the first of those charges as appearing in the schedule referred to the appellant's receipt of two distinct bribes, viz., the horse with which we are occupied in the present appeal, and two hundis for Rs. 55 and Rs. 50 with which this appeal is not concerned. At the trial the learned Magistrate, wisely as I think, decided that these two charges should be tried separately, and the case which he first took up was that in which the present appeal was lodged. The trial in this present case began on 5th July and the evidence of Narayandas Kanhayalal began on 6th July. Prior to that date Narayandas Kanhayalal equally with the present appellant had been an accused in respect of these offences of bribery. But, on 6th July, Narayandas was a witness and was not an accused in respect of the offence of bribery in regard to this horse. He still however remained an accused person to the bribery connected with the two hundis, and in that case he was not discharged from the position of an accused until 17th July. I agree with Mr. Velinkar's contention that when Narayandas Kanhayalal began his evidence as a witness on 6th July, there had been given to him by the responsible authorities an impression or

understanding that unless he told in this present case that which the Crown believed to be the truth, he was liable to be prosecuted on the charge connected with the hundis.

In this state of the facts Mr. Velinkar urges that there has been by the Magistrate a violation of S. 342, Cl. 4, Criminal P. C., inasmuch as, according to the argument, Narayandas Kanhayalal still occupied the position of an accused, so that no oath could be legally administered to him. That argument is admittedly based on the contention that Mr. Davar, who by the orders of Government was conducting the case for the prosecution, had no authority to withdraw from the prosecution as against Narayandas Kanhayalal. The argument is that Mr. Davar's authority was limited to the prosecution of the present appellant, that consequently he had no authority to withdraw the case as against Narayandas Kanhayalal and that therefore the Magistrate's order discharging Narayandas Kanhayalal upon Mr. Davar's application was illegal. In my opinion however the very basis of this argument fails, because I think that the fair construction to put upon the orders of appointment of Mr. Davar is to regard them as appointing that gentleman under S. 495, Criminal P. C., as a Public Prosecutor for the whole case. If that is so, then Mr. Davar was certainly competent to withdraw as against Narayandas Kanhayalal, and in that event it is admitted that the order of discharge would be good and that Narayandas would in this respect be a competent witness.

I think further that the objection is bad, because Narayandas Kanhayalal cannot be regarded as "the accused" within the meaning of these words as they appear in S. 342, Cl. 4. That section is devoted to laying down the manner in which the Court is to examine an accused person then before it as an accused person, and the words "the accused" in Cl. 4 must, in my opinion, be read as referring to the accused then under trial and examination by the Court. That admittedly was not the position occupied by Narayandas Kanhayalal on and after 6th July. In support of the view which I take as to the scope of S. 342, Cl. 4, I may refer to the decisions of this Court in *Queen-Empress v. Mon*

Puna (1), *Empress v. Durant* (2) and *Queen-Empress v. Hussein Haji* (3).

The second of these preliminary objections as to procedure turns upon S. 343, Criminal P. C. That section provides that except as enacted in certain sections dealing with the tender of pardon to accomplices,

"no influence by means of any promise or threat or otherwise shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge."

The section does not declare what would be the consequences if an accused person did make a statement under inducement. But I will assume for the purposes of the argument that such a statement would be wholly inadmissible. I am unable however to see that Narayandas Kanhayalal is affected by this proposition, because from what I have said before, it will be clear that, in my opinion, the inducement offered to Narayandas Kanhayalal was offered to him not as an accused in the hundi case, but as a witness in the present case. In that view the objection, invalid as to the admissibility of Narayandas's testimony, would be quite good as an objection only to Narayandas's weight or credit. And I agree that the objection is good so far as it refers to credit. That, I think, is a sufficient technical answer to this technical objection, though I note that in *Queen-Empress v. Hussein Haji* (3), Candy, J., said that S. 343, evidently referred to the same accused person who had been named and described in S. 342.

For the purposes of the present argument it is not necessary for me to commit myself to a formal agreement with Candy, J.'s opinion, though I must not be taken to suggest any dissent from it. It is enough for our present purposes to observe that S. 343 must incontestably be limited in some way or other. If *A* is accused of murder and *B* happens at the same time to be accused of an unrelated theft, and if some one interested on behalf of *A* in the murder case makes a promise to *B* to induce him to give evidence tending to exonerate *A*, and if all these things are proved at the time that *B*'s evidence is tendered before the Court on the trial of *A*, then it is my opinion that *B* would be a competent witness in spite of the inducement, though, of

course, the inducement alleged would diminish the credit to be attached to him. This construction seems to me to be favoured by S. 118, Evidence Act, which provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

This section suggests, what numerous Judges have observed, that in India the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration. The Indian rule is, I think, certainly not less liberal as to the admission of evidence than the rule in England. And in England it appears to me from such authorities as have been referred to before us, that Narayandas Kanhayalal would be held to be a competent witness. Upon this point reference may be made to *Winsor v. Queen* (4), where the woman Harris was accepted as an admissible witness, though she had been jointly indicted with the prisoner under trial, though she had pleaded not guilty, and though that plea of hers was at the time undisposed of. To this effect also the law in England is stated in Roscoe's Criminal Evidence, Edn. 12, p. 113. On these grounds I am of opinion that there is nothing in S. 343, Criminal P. C., which rendered Narayandas Kanhayalal incompetent or inadmissible as a witness.

I may mention, though not as a necessary part of the argument, that Narayandas's evidence in this trial lasted from 6th July to 2nd August. He was discharged as an accused in the hundi case on 17th July. Under the law which provides that the witness's evidence should be read out to him when it is finished, his testimony as a whole must, I think, be referred to the date on which it was read out to him and accepted by him. That would be 2nd August, a date on which he had already been discharged in the hundi case. I mention this not as essential to the removal of the appellant's objections, but as a point worth noticing if only on the question of the credit of Narayandas Kanhayalal.

1. (1892) 16 Bom 661.

2. (1899) 23 Bom 213.

3. (1901) 25 Bom 422.

4. (1866) 1 Q B 390.

These preliminary points being thus overruled, we come to the question of the value or the worth of Narayandas Kanhayalal's evidence. Upon that point I quite agree with the learned Magistrate that Narayandas is on general principles a bad witness. He was an accomplice in this offence of bribery, and though not, in my opinion, by any means the worst kind of accomplice, still undoubtedly an accomplice. Moreover, I believe that, when he gave his evidence, there was present to his mind an impression that if he deposed to what the Crown believed to be the truth, it would be advantageous to him in regard to his position in the connected hundi case. All that may be freely allowed, but in my judgment the worth of a witness is to be determined not by general principles in the abstract, but by general principles as applied to the particular facts of each case. Though much argument has been devoted to this topic and Mr. Velinkar endeavoured to disabuse me of the idea which I hold, I must still adhere to my view, in regard to the weight of Narayandas's testimony, that the witness stands in no appreciably worse position than any other accomplice witness giving evidence under a conditional pardon. Now the assessment of the evidence of such witnesses is a familiar task to our Courts, and there is no reason to think that the assessment of Narayandas's evidence presents any insuperable difficulty.

In so far as he is an accomplice the law, as laid down in Ss. 133 and 114, Illus. (b), Evidence Act, declares that while the Courts should ordinarily make a presumption against the credit of an accomplice, that presumption may be displaced by other circumstances, notably by sufficient corroboration of the accomplice on material points. I certainly have no wish to say anything calculated to induce any lower Court to believe an accomplice lightly. I entirely agree that an accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. All that is true, but it is not, in my opinion, the whole truth. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is also, in

my view important that the requirements of the legislature in this respect should not be exaggerated by the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are in their very nature difficult of detection.

It seems to me that when all legal precautions have been taken and all relevant considerations duly weighed, there remains the plain question whether the Judge or Magistrate does or does not believe the particular accomplice. That, I think, is a question which it is the Judge's or Magistrate's duty to answer. And, if after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, I conceive it to be his duty to say so and to give effect to his mental conviction. This process, in my opinion, is in direct conformity with the definition of the word "proved," as that definition is given in the Evidence Act. It may be, of course, that at the end of all things the Magistrate may still remain doubtful whether he can believe the accomplice or not, and if he does remain doubtful, he must say so. But within my experience that attitude of mere hesitating doubt is not likely to occur usually where, as here, a vigilant and observant Magistrate has had an accomplice witness for many days before him under examination and cross-examination. I, therefore, approve of the manner in which the Magistrate has dealt with this part of the case, and it appears to me that great weight is due by this Court to the Magistrate's appreciation of Narayandas's testimony. For the Magistrate has believed Narayandas not lightly or hastily, but only after mature consideration of all the evidence and after allowing the fullest weight to the weaknesses and infirmities to which the witness's testimony is inevitably subject. [His Lordship then discussed the evidence and concluded:]

In my opinion, therefore, the conviction and sentence should be confirmed and the appeal should be dismissed. Before parting with the case I desire to put on record my sense of the valuable services which the police officers concerned in this investigation have rendered to the cause of public justice.

Shah, J.—At the outset I desire to express my general agreement with the

observations made by my learned brother as to the assistance which the Court has received from the full and clear arguments of the counsel on both sides, as to the patience and care which have been brought to bear by the learned Magistrate upon this trial, and as to the fair and efficient manner in which the investigation has been made in this case by the investigating police officer. The appellant, Govind Balwant Laghate, was the first class Subordinate Judge at Nasik in September 1913, and it was on 25th September that his transfer from that District to the District of Nagar was gazetted. Before that time two cross-suits had been filed in the Court of the first class Subordinate Judge at Ahmednagar in which one Mirabai was concerned. That Mirabai is the adoptive sister of one Narayandas Kanhayalal. She is a widow and her case was managed by her brother. This Narayandas lives at Chandwad and is trading at Chandwad, Lasalgaon and Bombay in the name of Kanhayalal Benkatlal. The prosecution case is that he, being desirous of interesting and influencing the accused Laghate in favour of his sister with reference to her claim, went to the accused and saw him on 4th October. He repeated his visit to him on 8th October, and on that day it is said that he made a payment of Rs. 24 to the accused and an arrangement was entered into between them whereby he undertook to supply a new horse to him and to take his old horse from him. This is the first stage in the 'prosecution story. It is said that during the following Christmas holidays the accused, who was then working as a first class Subordinate Judge at Nagar, went with Narayandas Kanhayalal from Ahmednagar to Bombay, that the expenses of the trip were defrayed by Narayandas and that when he was in Bombay, two hundis were given by Narayandas to him by way of further bribe; this is the second stage in the prosecution story. The third stage in the story is that during the Shimga holidays, in March 1914, the accused and Narayandas again went to Bombay when the accused made a demand of an annual payment of Rs. 300 for the benefit of his private temple of Ram at Poona.

During this time the suit of Mirabai was slowly progressing; but it was ulti-

mately compromised on 29th June. It is not suggested in this case that any favour in fact was shown to Mirabai in the course of the suit, and I do not, therefore, consider it necessary to state in detail the progress of the suit during this period.

In November 1914, in consequence of certain information received, the Criminal Investigation Department was asked to make investigation with reference to the allegations which were then made, and as a result, the Inspector, Mr. Girdhar-sing, lodged a complaint on 19th February 1915 after the necessary sanction of the Local Government was obtained. On this complaint, an order was made under S. 202, Criminal P. C., authorizing the same officer, the complainant, to make further investigation. Then, on 17th May 1915, a further sanction was granted by the Local Government with reference to several charges of bribery against the present accused, and the charge with which we are concerned in this case is the very first charge mentioned in the schedule attached to that order. Then, on 17th June, there was a complaint made against the accused Laghate and two others, Narayandas and Jagannath, by the same officer with reference to the horse and hundis said to have been given as bribes to Laghate, with the result that both the complaints were sent for trial to the Additional District Magistrate, who ultimately tried the present case.

On 5th July, which was the day fixed for the trial, of all the three accused on the charges mentioned in the complaint of 17th June, on the application of the prosecuting pleader, Mr. Davar, the learned Magistrate decided to separate the trials with reference to the two heads of the charge against the accused. The result was that the case relating to the hundis was separated and kept aside and the trial of the case relating to the giving of the horse as a bribe was proceeded with. After the trials were thus separated, an application was made on behalf of the prosecution in this case to withdraw from the prosecution of the accused Narayandas; and with the consent of the Court to the withdrawal, an order of discharge was made by the learned Magistrate as provided in S. 494, Criminal P. C. Narayandas was examined as a witness in the case. His

examination commenced on 6th July and his examination, before the charge was framed, was finished on 15th July and his further cross-examination was proceeded with, after the charge was framed, on 30th July and 2nd August. I have so far stated the prosecution case briefly and the facts connected with the investigation which ultimately led to the present proceedings. On a consideration of the evidence of the case, including the evidence of Narayandas, the learned Magistrate has come to the conclusion that the charge is clearly proved against the appellant and has accordingly convicted and sentenced him. It is against this order of conviction and sentence that the present appeal is preferred, which was originally filed in the Sessions Court of Ahmednagar and subsequently transferred to this Court. It is urged by Mr. Velinkar for the appellant that the order of discharge made under S. 494 is not valid, because Mr. Davar had no authority to withdraw from the prosecution of Narayandas, and that as there was no valid discharge Narayandas was, at the time when he was examined as a witness, an accused person in the case within the meaning of S. 342, Criminal P. C., and therefore not a competent witness.

The second argument urged by Mr. Velinkar is that when Narayandas was examined as a witness, he was an accused person in the hundi case which was then pending, and as he was at the time of giving evidence under the inducement of a prospect held out to him that the Crown would withdraw from the prosecution in the hundi case if he gave his evidence in this case properly, the provisions of S. 343 of the Code have been contravened; and it was suggested that the evidence taken contrary to the provisions of the section would not be admissible. As regards the first contention it really depends upon the construction to be placed upon the order of the Government which was made on 17th May 1915. No doubt in that order it is stated that Mr. Coyaji and Khan Bahadur Davar shall conduct the prosecution of the accused, and at that date the only accused was Laghate. The complaint against the other accused was made subsequently. But it seems to me on a fair construction of this order that the appointment of these gentlemen is not

with reference to a particular accused, but with reference to a particular case. That is the kind of appointment, for which provision is made in S. 492 as well as S. 495, Criminal P. C., and if the appointment was for the case, it seems to me that if any other accused person came to be implicated subsequently, both of them would be competent to conduct the trial as against all the accused. It is clear that Mr. Davar, who withdrew from the prosecution of Narayandas, was really an officer specially appointed by the Local Government to conduct the trial in the lower Court within the meaning of S. 495. It follows that under the second clause of that section he would have power to withdraw from the prosecution as provided by S. 494. It seems to me therefore that the only objection urged against the validity of the discharge fails.

An objection was taken on behalf of the defence in the lower Court at the time this order of discharge was made that as the object of the prosecution was to secure the evidence of Narayandas as a witness, it would not be right for the Court to give its consent to the withdrawal and to make the necessary order of discharge. But having regard to the decision in *Queen-Empress v. Hussein Haji* (3) it is clear that it is legally open to the Crown to withdraw from the prosecution of any particular accused, even if it be for the purpose of securing him as a witness in the case. Of course it is for the Court, whose consent is necessary under S. 494, Criminal P. C., to exercise its discretion according to the circumstances of each case, and it is open to that Court to give or withhold its consent. It follows that the order of discharge being valid, Narayandas ceased to be an accused person in the present case: and the only provision, which could prevent Narayandas from being examined as a witness contained in sub-S. 4 of S. 342, would have no application to him at the time when he was tendered as a witness. "The accused" mentioned in that sub-section is the accused then under trial and examination and no other. This view has been taken in the case of *Empress v. Durant* (2) and it also derives support from *Queen-Empress v. Mona Puna* (1), in which it has been held that by the word "accused" in S. 342 is meant a person over whom the

Magistrate or other Court is exercising jurisdiction. This contention must therefore be disallowed.

The second contention which has reference to S. 343, Criminal P. C., is based upon the allegation that when Narayandas commenced to give his evidence, he was under the influence of an inducement that he would be able to secure immunity from prosecution in the hundi case, only if he gave his evidence in the present case in a manner which the prosecution would believe to be true. It was urged with reference to this contention by Mr. Coyaji that really there was nothing to show that while giving evidence he was under the influence of any such inducement. But it seems to me that the evidence of the investigating officer and the letter which the District Magistrate wrote to Mr. Davar on 5th July 1915 and the statement of Narayandas taken together show that the witness Narayandas was an accused person in the hundi case and that while that case was kept pending against him, an order of discharge in the present case was obtained, and it is quite a fair inference to draw that he was then under the belief that he would obtain his immunity from prosecution in the hundi case only if he gave his evidence in a truthful manner or under the circumstances; in other words if he satisfied the prosecution.

Under these circumstances it seems to me that the contention of Mr. Velinkar that Narayandas, when examined from 6th to 15th July, was under this inducement to earn his immunity in the other case which was pending against him, is made out; and it is obvious under the circumstances that it would really mean that Narayandas would have strong reasons to think that his immunity would largely depend upon his implicating the present accused, whom the prosecution believed to be implicated in this affair. The question then arises, whether this kind of influence is within the prohibition in S. 343 with reference to the person in the position of Narayandas. It is urged by Mr. Coyaji that S. 343 has no application as, in the first place, it really refers to, and provides against, the influence being used by a Court and not by anybody, and secondly, that the expression "an accused person" in the section really

refers to "the accused" referred to in S. 342, that is, to the accused then under trial and examination and to no other person. I do not desire in this case to express any definite opinion on the scope and meaning of S. 343, as it is not necessary to do so. But it does seem to me that there is a difficulty in accepting the limited construction suggested by Mr. Coyaji. There are no words in the section to show that the prohibition contemplated by the section refers to the Court and not to any other person, and that an accused person, within the meaning of the section, is the accused under examination and trial. There is some force in the argument on the other side that Narayandas was undoubtedly an accused person in the hundi case, and that the fact that he was to be examined as a witness in the horse case would make no difference in his position as an accused in the hundi case. It is also urged by Mr. Velinkar that in this Chapter, which relates to general provisions as to inquiries and trials, there are several sections dealing with different and independent matters and that there is no necessary connexion between Ss. 342 and 343. It is not necessary, however, for the purposes of this case to express any definite opinion on the applicability of S. 343 to the circumstances under which Narayandas came to be examined in this case. I feel quite clear that, even assuming that S. 343 would apply to such inducement as must be deemed to have been held out to Narayandas in this case, the admissibility of the evidence of Narayandas as a witness in this case is not in any way affected. He remains a competent witness in this case, because he ceased to be an accused person in consequence of his discharge under S. 494, Criminal P. C., and the only provision which would render him incompetent as a witness, viz., sub-S. 4, S. 342, would have no application.

Whether the provisions of S. 343 have been contravened or not, it is clear that the circumstances under which Narayandas was examined as a witness must materially affect the weight to be attached to his evidence. It is not the evidence of an ordinary accomplice; but it is the evidence of an accomplice who, while giving evidence, is under the inducement of securing his own liberty in

the connected case. It is not unfair to say that he is a witness whom even the prosecution were not prepared to trust to tell the truth without keeping the hundi case pending against him. I desire to deal here with two arguments urged by Mr. Coyaji with reference to the weight to be attached to the evidence of Narayandas. It was urged by him that he would not be in any worse position than a pardoned approver. I am not able to agree with this contention. The difference between the two positions to my mind is that in the one case the pardon is given openly to the knowledge of the parties and subject to the statutory conditions and limitations. In the other case the fact of the inducement is known only to the party to whom the inducement is given and to the party who gives the inducement and not to all the parties, not even to the Court, before the evidence relating to the inducement is adduced in the course of trial. Besides, the approver's liberty is subject to the control of the Court, whereas the liberty of the witness in the position of Narayandas, in the first instance, is in the hands of the party who is supposed to have held out the inducement. The second argument is that though up to the 17th of July there may have been this inducement, still after the 17th of July when the order of discharge was made in the hundi case, there could be no such inducement operating on his mind. This argument is plausible but not sound; because it seems to me that the whole story was really given out at a time when the inducement would be operating on his mind and the fact that the document ceased to exist subsequently would not materially affect the position.

After his examination was finished on the 15th July, it was hardly open to him to go back upon his story in his further cross-examination on 30th July and 2nd August as suggested by Mr. Coyaji. (His Lordship then discussed the evidence and concluded:) These are really the material points in the story of the prosecution, and it seems to me that even without the evidence of Narayandas the case for the prosecution, so far as the giving of the horse as an illegal gratification is concerned, is clearly proved; and I have no hesitation in saying that this conclusion

is consistent with, and derives further support from, the evidence of Narayandas. It follows that the charge is established and that the conviction of the accused under S. 161, I. P. C., is proper. As regards the sentence, having regard to all the circumstances, I do not think it is excessive. I therefore agree that the conviction and sentence must be confirmed and the appeal dismissed.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 237

SCOTT, C. J. AND BEAMAN, J.

Jagjivan Mulji — Defendant — Appellant.

v.

Nathji Jageshwar — Plaintiff — Respondent.

Second Appeal No. 840 of 1914, Decided on 3rd December 1915, from decision of Joint Judge, Ahmedabad, in Appeal No. 396 of 1912.

Evidence Act (1872), S. 92 — Written agreement—Addition of new terms cannot be permitted—Transfer of Property Act (1882), S. 40.

Criminal proceedings between the parties were compounded on certain terms arranged between them and set forth in great detail and with much care and elaboration in a written agreement. The agreement contained no reference to the subject-matter of the suit which the plaintiff subsequently instituted, alleging in the plaint that the said subject-matter formed part of the consideration for the compromise in the criminal proceedings:

Held: that in putting forward the case as alleged in the plaint, the plaintiff was attempting to add a new term to the written agreement which settled the terms of the compromise, and that therefore under the provisions of S. 92, Evidence Act, the plaintiff could not be permitted to do so.

[P238 C 2; P 239 C 1]

H. V. Divatia—for Appellant.

G. N. Thakor—for Respondent.

Scott, C. J. — The plaintiff sued for the removal of what is styled in the plaint a curved heap of clay projecting beyond the otta of a house formerly belonging to defendants 1 and 2 and subsequently transferred to defendant 3. He alleged that in a complaint lodged before the 3rd Class Magistrate against defendants 1 and 2, it was agreed that the heap projecting beyond the otta was to be removed and that owing to an undertaking accepted by defendant 4 the complaint was withdrawn; and later

on he says that defendant 3 has been joined as he purchased the plaint house, that is, the house to which the otta appertained mentioned above in the plaint, and defendant 4 was made a party because of his kabuliyat to get the heap removed. Defendant 4 in his written statement denied being a surety to the compromise between the parties and said that in the criminal proceedings he was working as a mukhtyar on behalf of defendants 1 and 2, and that finally an amicable settlement was arrived at and mutual documents were passed whereby defendants 1 and 2 had agreed to remove so much of the otta as might be found to have been newly enlarged, and that he had been unnecessarily joined. Upon the evidence the learned trial Judge states :

"It appears that a charge was framed against defendant 1 on 9th January 1910, and the agreement was entered into two days later, i. e., on 11th January 1910. But the defendants were acting under legal advice. Messrs. Harishankar D. Joshi and Mulji Narottam, mukhtyar, were their advisers in the Magistrate's Court. The written agreement, Ex. 44, is proved by the latter, and in his written statement, Ex. 7, he supports the oral agreement set up in the plaint."

That is a misstatement of defendant 4's written statement which, as already observed, states that an amicable settlement was arrived at and mutual documents were passed whereby defendants 1 and 2 agreed to remove so much of the otta as might be found to have been newly enlarged. Ex. 44, which was the document drawn up by the legal advisers of the parties in compromise of the criminal proceedings, commences with the recital of disputes relating to a privy and land and other matters concerning the old houses of the plaintiff and defendant 1 adjoining each other, and after that recital it states :

"Ultimately I filed a complaint. The same is this day compounded, i. e., a settlement is come to as follows."

Then follow elaborate provisions with regard to a privy and passage between the two houses without any reference whatever to any projection from the otta, and it is stated and also proved to the satisfaction of the lower Court that this document was prepared in duplicate, one counterpart being signed by each of the contesting parties. Therefore we have a full and elaborate statement of the consideration for the withdrawal of the criminal proceedings. The plaint

however is entirely silent as to all the considerations stated in Ex. 44, and states that owing to an undertaking accepted by defendant 4 the complaint was withdrawn, the undertaking being with reference to the removal of the projecting part of the otta. It appears to me that in putting forward the case that the complaint was withdrawn in consideration of the compromise to remove the otta, the plaintiff is attempting to add a new term to the agreement, Ex. 44, which settled the terms of the compromise. The point appears to have escaped the notice of the lower Courts, and we have therefore now had a prolonged argument on the part of the plaintiff's pleader, and since the adjournment yesterday he has addressed us again upon the same point, but nothing that he has urged has in any way shaken my conviction that the alleged agreement sued upon is without consideration.

In this view of the case, it is not necessary to consider another important and difficult question of law, which also appears to have escaped notice in the lower Courts, and that is whether an affirmative agreement to do certain work can be enforced against the purchaser with notice of the agreement so as to justify a mandatory injunction calling upon him to the work. It apparently could not be enforced in England upon the authority of *Tulk v. Moxhay* (1) and subsequent cases. Whether it could be enforced under S. 40, T. P. Act, is a point which, in view of the failure of the plaintiff to prove consideration for the agreement set up, it is not necessary now to decide. I would therefore reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

Beaman, J.—I concur. This suit has been brought to enforce an obligation arising out of contract under S. 40, T. P. Act. It is plain then that if we cannot look at the contract under S. 92, Evidence Act, it would not be open to us to give the plaintiff the relief he seeks. And the question which has to be answered is whether we are permitted by the terms of S. 92, Evidence Act, in the state of facts alleged in the pleadings and held proved by the Courts below, to look at the oral agreement upon which the plaintiff relies.

1. (1848) 2 Phill 774=1 Hall & Tw 105.

Briefly his case is this, that owing to certain disputes between himself and defendants 1 and 2 he had instituted criminal proceedings, and those proceedings were compounded on certain terms arranged between himself and the said defendants 1 and 2 and set forth in great detail and with much care and elaboration in a written agreement, which is Ex. 44 in this case. That agreement contains no reference to the subject-matter of this suit, and the plaintiff in bringing his suit has to rely upon an oral agreement, which we find in his plaint is referable to the consideration expressed in, and presumably, therefore, exhausted by, the following terms of the writing, Ex. 44. He seeks to evade this difficulty, first, by saying that the oral agreement upon which he relies does not fall within the general prohibition of the opening part of the section. In my opinion it very clearly does. It cannot be anything less than an addition, and a very material addition, to the promises or undertakings exacted from defendants 1 and 2 in consideration of the plaintiff withdrawing his criminal prosecution. That hardly admits of argument.

The plaintiff then fell back upon Prov. 2 to that section and contended that this was a separate oral agreement upon which the writing is silent and which is not inconsistent with its terms. But having regard to the fact that the plaintiff himself refers its consideration to the consideration set forth in the writing, it becomes perfectly evident that the oral agreement now relied upon must be inconsistent with the terms of the writing, Ex. 44, as that is to be regarded as a complete expression of the contract then entered into between the parties. It might be simply illustrated in this way, that a writing which shows that A bought from B an article X for a given sum of £10, is inconsistent with the subsequent averment of A that he likewise bought from B an article Y for the same consideration. For the effect of that would be that while the writing expresses that the article X was bought for £10, A now seeks to show that the price was less than £10 or that nothing at all was paid for Y. In the former case a separate oral agreement set up would clearly be inconsistent with the writing, and in the latter case it would

leave the agreement sought to be enforced without any consideration at all.

Lastly, I understand the plaintiff relies upon Prov. 4, which permits any subsequent oral agreement which rescinds or modifies the writing to be proved. But again it is the plaintiff's own admission, and it is proved beyond doubt, that this was not a subsequent oral agreement, but was part of a single transaction to which expression was given in Ex. 44. It must have been arrived at before that writing was drawn up. The writing is not one of an informal or careless character in favour of which any presumptions could be drawn in order to make Prov. 2 applicable. It appears to have been drawn under the careful supervision of the legal advisers of the parties. In these circumstances I am of opinion that the order proposed by my Lord the Chief Justice is unquestionably right that we are precluded from looking at the oral agreement upon which the plaintiff relies by S. 92, Evidence Act, and as a consequence his suit fails and must be dismissed with all costs.

G.P./R.K.

Decree reversed.

A. I. R. 1916 Bombay 239

BEAMAN, J.

Laxmibai and another—Plaintiffs.

v.

Keshav Annaji Pokharkar and another—Defendants.

Original Civil Suit No. 1265 of 1914,
Decided on 21st August 1915.

(a) Evidence Act (1872), S. 92 — Suit against B and C for specific performance of contract executed by B alone—C described in contract as broker—Parol evidence to show that real parties were plaintiffs and C and that B was only benamidar is inadmissible—B can however prove by parol evidence true nature of agreement between him and C.

The plaintiffs sued B and C for specific performance of a contract, in form made and executed by B alone. In the written contract C was described as a broker to whom both the plaintiffs and the defendant B agreed and bound themselves to pay brokerage:

Held: (1) that S. 92 precluded the plaintiffs and the defendant B from giving parol evidence to show that the real parties to the agreement were the plaintiffs and the defendant C, and that the defendant B was only a benamidar. [P 244 C 1]

(2) that *B* however might prove by parol evidence, if he could, the true nature of any agreement which subsisted between him and *C*.

(3) that when the evidence as to the true nature of the agreement between *B* and *C* was admitted, it would be treated as evidence between all the parties, and their legal rights and liabilities would be adjusted in the light of this evidence.

Real benami transactions are triangular. Where a transaction is truly benami, i. e., where the purchase has been effected in the name of the nominal purchaser, no difficulty would arise under S. 92 in settling the dispute between the nominal and the real purchaser, as between them there would be no writing. But in transactions supposed to be benami but which are not benami at all, as for example, where a person with the object of shielding his property from his creditors purports to sell it to some one named by himself, and the sale-deed is accordingly made out in that person's name as the purchaser, it would not be open to parties to such a contract to give parol evidence of the true nature of the transaction underlying it. Parol evidence however may be given in such cases also to serve a different purpose, that is, to show that the transaction was bad for failure of consideration.

[P 244 C 1; P 247 C 1; 245 C 1; P 246 C 1;]

(b) **Contract Act (1872), S. 233—S. 233 cannot override law of evidence.**

Section 233 has nothing to do with and cannot override the general law of evidence. [P 243 C 1, 2]

(c) **Practice—Fraud.**

It is not a fraud merely to break promises or fail to perform obligations in futuro. Frauds ought to be restricted to misrepresentations, and dishonest misrepresentations of existing facts.

[P 244 C 1]

Davar, Gadgil and Desai—for Plaintiffs.

F. S. Talyarkhan, Rangnekar, Wadia and Kanga—for Defendants.

Judgment.—The plaintiffs, Laxmibai and Anandrao sue the defendants, Keshav and Punamchand, for specific performance of a contract to buy certain immovable property made on 4th March 1914 and in form made and executed by Keshav alone. There is an alternative prayer for damages, and at the conclusion of the case the plaintiffs expressed a desire, in view of certain anticipated difficulties, to abandon their claim for specific performance and confine it to damages. The case has occupied a considerable time in hearing owing to the difficulties which I felt from the beginning in drawing the line between what was, and what was not, open, first, to the plaintiffs, and, secondly, to defendant 1 to prove in explanation or variation of the written contract.

The difficulties created by S. 92, of our Evidence Act, appear to me to be obvious. In the English Courts, in somewhat analogous if not exactly similar cases,

they have been surmounted by processes of reasoning which, with great respect to the very eminent and learned Judges using them, do not appear to me to be adequate. Nothing could well be plainer than the provisions of S. 92, Evidence Act. Where Courts have to deal with a written contract, the law of this country absolutely prohibits parol evidence being given except within the limits very carefully laid down in S. 92 itself. Although, no doubt, the law of England was intended to be in substance the same as the law to which expression has thus been given in S. 92, the Judges had no definitely worded Statute to interpret and by which to be bound as the Courts in India have. Speaking generally, the rule laid down in England and considered to be settled by the decision in the leading case of *Higgins v. Senior* (1) was that where there was a written agreement or contract not under seal, the obligor might not give parol evidence to evade his liability even though the facts upon which he relied were within the plaintiff's knowledge: while, on the other hand, the plaintiff might pass over the actual obligor of the contract if he chose to do so and seek the real maker behind him. In other words, if *A* contracted as an agent in such a form as to make himself personally liable, his principal being *B*, the plaintiff might, at his option, show by parol, notwithstanding what appeared on the face of the document, that his contract was really with *B*. *A* however could not by way of defence prove by parol that he was not, as he appeared to be on the face of the document, liable under it. So far the distinction is perfectly intelligible, though I think it would be extremely difficult to reconcile it with the strict language of S. 92, Evidence Act.

In the long and elaborate argument on behalf of Mr. William Senior, the learned and eminent Counsel engaged repeatedly admitted that the substitution of the real for the merely nominal contracting party was a variation of the written contract. Indeed it is more than a variation. It amounts to making a new contract totally different from that which has been expressed in the writing. And it appears to me, looking at this matter logically, that this must

1. (1841) 8 M & W 884=11 L J Ex 199.

inevitably be so. The attempts of the learned Judges concerned to distinguish upon the ground that the addition of a party not appearing on the face of the document as a party liable, along with the party expressed in the document to be so liable, in no variation but merely an addition, seems to me to be a super-refinement of reasoning which could not be consistently sustained.

It must be a very different thing for a person contracting that A shall pay him certain money afterwards to insist that not A and B shall pay him that money. And to say that it is not a term of the contract that the promisor contracts to pay the stipulated price or supply the stipulated goods so long as somebody else is put into his shoes can easily be exhibited as a glaring fallacy, if we once subtract from the cases that have come before the Courts the knowledge of the plaintiff himself. Where the plaintiff knew that a person appearing on the face of the document as the contracting party was not so but was acting for a principal, then it is easy enough to argue though the argument reveals, in my opinion, some laxity of thought, that proving the truth is proving no more than what the plaintiff knew to be the real as distinct from the apparent agreement and therefore that the substitution of the unnamed but real for the named but nominal contracting party appearing on the document is in no sense a variation of any of the terms of the contract. But suppose that the plaintiff knows of no one but the person with whom he contracts and who signs the writing as principal; then I do not believe that any Court of any one of the Judges who have so frequently subscribed to and approved of something like the reasoning I have just outlined, would hear of such a person being allowed to prove that notwithstanding the plaintiff's ignorance he was really acting for some third party of whose existence the plaintiff had no knowledge. Still less could it then be said that if the plaintiff contracted with A, and A alone being allowed to prove that he in turn was acting for X, and therefore X ought to be made liable to the plaintiff, was not a variation of the only contract which the plaintiff intended to enter into and of the existence of which he was aware namely, the contract between himself & A.

On a careful and critical examination of most of the leading cases to which I have been referred, it becomes very easy to trace the confluence of these lines of thought and the consequent confusion drawn into the reasoning. As I have pointed out, the rule laid down in *Higgins v. Senior* (1) is perfectly precise and intelligible, whether well or ill grounded in reason. But as soon as we turn to such cases as *Wake v. Harrop* (2) and *Cowie v. Witt* (3), which profess concurrence with *Higgins v. Senior* (1), we shall find that the ratio of the decision is totally different from and diametrically opposed to, that adopted by Baron Parke in *Higgins v. Senior* (1). So too in the first case of *Higgins v. Senior* (1) Baron Parke felt some difficulty over the very plainly worded and therefore limitative decision in *Jones v. Littledale* (4) and wished to put it upon a slightly different ground. But I think it may fairly be said that the result of the judgment in *Higgins v. Senior* (1) was to put the law in England on a clear basis as to the rights of parties and their obligations and liabilities in respect of amplifying the terms of or being strictly bound by the terms of written contracts. Now observe what happened in the later cases of *Wake v. Harrop* (2) and *Cowie v. Witt* (3).

Here the contract was made by an agent in his own name and in form directly binding him as principal. No dispute was made of this at the trial but it was alleged that there was a contemporary understanding between the plaintiff and the agent that the real contract was to be with the principal in Messina. So that when the case came on for trial the plaintiff here not suing the undisclosed principal but the agent, who on the face of that writing, was primarily and individually bound, the Court seemingly without difficulty or hesitation held that the defendant might evade the responsibility he had undertaken in the writing by parol evidence, proving a contrary understanding which existed at the time the agreement was made. And the language of Baron Bramwell is so liberal that if it really expresses the law in England and were to be transferred to this country, it would

2. (1861) 6 H & N 768=30 L J Ex 273.

3. (1874) 23 W R 76.

4. (1837) 6 Ad & E 486=1 N & P 677.

entirely abrogate S. 92, Evidence Act. The learned Judge points out that a writing not under seal in England is not a contract but only evidence of the contract.

He goes on to say that being in writing, it is conclusive evidence of the contract and the law of England forbids parol evidence to be given of any variation in its terms. So far he keeps to the principle and very nearly the language of S. 92 of our Evidence Act; but immediately thereafter he lays it down that parol evidence may nevertheless be given to show what was the real contract between the parties; and if this language has any meaning at all, it must mean the real, as contradistinguished from, and opposed to, the apparent contract exhibited in the writing as a whole and its terms in particular. That would mean nothing more nor less than that a party to the writing might give parol evidence to show that it did not express the agreement really entered into between himself and the plaintiff but that there was another and different agreement, and that alone bound them. I say without the slightest hesitation that, notwithstanding the attempts made to put this decision upon a quite different basis, that is the real effect of the language used by Lord Bramwell. The illustrations he gives before coming to that part of his judgment appear to me to lie quite outside the scope of the question he had to answer. It is one thing to say that a man, who intended to sign an agreement to purchase a horse but by accident signed an agreement to purchase another horse or landed estate, might not prove the actual fact, and quite another thing to say that a man, who has deliberately and with his eyes open signed an agreement, with every term of which he was familiar, could introduce parol evidence later on to prove that the agreement was not in substance as it was made to appear in form in the writing. A like distinction is clearly to be drawn between the other illustrations suggested by Lord Bramwell.

In every case of the kind I am considering, and the Courts were considering in such cases as *Higgins v. Senior* (1), *Wake v. Harrop* (2) and *Cowie v. Witt* (3), there is no question of a party appearing as a signatory upon the paper as

principal having been trapped by any mistake of fact at the time into signing that which he did not mean to sign. The question to be answered is of a totally different character and the principles governing the cases in which that question arises really appear to me to be restricted to principles of proof and not of equity. In the cases of *Wake v. Harrop* (2) and *Cowie v. Witt* (3) the Courts, neglecting the rules of proof altogether, as it seems to me, held that it was an equitable defence which was open to the defendant because the plaintiff knew of the contemporary oral agreement and therefore it was inequitable on his part to hold the defendant to the terms of the writing. Now, that may very well be so, but it obviously gives the go-bye to all that is important in principle in the law of evidence. So when we turn to our carefully and exactly drawn S. 92, Evidence Act, it is clear that cases of that kind were within the contemplation of the Legislature; for any contemporary oral agreement may be proved, provided that it be not inconsistent with the terms of the writing. But if it be inconsistent, as it was certainly, in my opinion, in all the English cases I have cited, then parol evidence is expressly excluded; and if parol evidence be excluded, the Court would never be in a position to know of the inequitable conduct of the plaintiff and thereupon to give effect to an equitable defence which never ought to have been heard.

Such are some at least of the introductory difficulties with which I had to deal when the case opened, in my desire to keep the procedure within the strict principles of this somewhat difficult branch of the law of evidence. If we are to apply the doctrine of *Higgins v. Senior* (1), then I do not doubt that it would have been open to the plaintiff to go behind the written instrument and prove that the agreement of which he seeks specific performance was really made between himself and defendant 2. It may however be doubted whether in England, if he had elected to follow that course, he would not have been obliged to release defendant 1 as merely the nominal maker of the writing and in law the mere hand of defendant 2. I have not yet found, and I have not been referred to, any case under this head decided in the English Courts in which, as here, the

plaintiff has sued the party nominally bound by the writing as well as some one behind him alleged to be really bound to the plaintiff by the actual existing contract between them. The converse was the case in *Wake v. Harrop* (2) and *Cowie v. Witt* (3). There the agent was directly sued and no attempt was made to sue the known principal, and the agent was allowed to evade responsibility. So in *Calder v. Dobell* (5), which strictly follows, instead of contradicting as the latter cases do, the principle of *Higgins v. Senior* (1), the plaintiff sued the undisclosed principal, Dobell, allowing the nominal executant of the writing, Cherry to go free, I confess that I still feel the very greatest difficulty in reconciling the procedure thus laid down in England logically with the language of S. 92. In order to do so we must adopt the view of the Madras High Court in the case of *Venkatasubbiah Chetty v. Govindarajulu Naidu* (6), where the Bench laid down in sweeping terms that a substitution of one party for another is no variation of any of the terms of the contract. If that be so, then no difficulty would occur; but I think I have conclusively shown that such a wide generalization ignores the logic of the principle, while it is an easy way out of the difficulties that otherwise might obstruct the course of inquiries into transactions such as those I am investigating. And here the position is greatly complicated by the obvious uncertainty in which the plaintiff was as to the form he had better give to his action. He has brought both the defendants on the record together, evidently relying on S. 233, Contract Act. In the commentaries upon that section will be found several of the English cases which I have been discussing, but the commentators appear to overlook the difficulty which is one not of contractual relations, but of evidence. Doubtless, were the contract oral, no difficulty would arise under S. 233, Contract Act. There would then be nothing to hinder the plaintiff from suing the agent who made the contract and proving at the same time that he was acting for the principal, disclosed or undisclosed, and so thereafter making one or the other

or both liable. But S. 233, Contract Act has nothing to do with and cannot override the general law of evidence. But if there be any writing according to which A, and A alone, is answerable to the plaintiff, I think it must always be a matter of great difficulty to say that either the plaintiff or A may bring parol evidence to show that some one else, say X, is really liable to the plaintiff in A's place. That difficulty has been considerably heightened in the present case by the introduction of Cl. 10 in the agreement, Ex. D. Here we find defendant 2 described as a broker to whom both the plaintiff and defendant 1 agree and bind themselves to pay brokerage.

Now can it be said that, where on the face of an agreement a man is described as a broker and it is a term of that agreement that the buyer and seller who are both named should pay him brokerage, it is not inconsistent with that statement in the writing to prove by parol that the person called a broker was not a broker but a principal? Is it not a variation of that term in the agreement to prove by parol that so far from being entitled to brokerage at the hands of the alleged purchaser, he is himself the purchaser and must, therefore, to that extent, pay himself his own brokerage? On behalf both of the plaintiff and defendant 1 desperate efforts were made to bring the case under some other provision of S. 92, Evidence Act. Defendant 1 said that he was entitled to prove by parol that he was induced to sign upon the false representations both of the plaintiff and defendant 2 that he was to incur no liability whatsoever and that his name was to be used merely to conceal the identity of the real purchaser. I cannot see under what part or provision of S. 92, parol evidence to that effect could be given. In my opinion it is not a fraud upon a man to explain to him that his name is intended to be used for a certain limited purpose unless it can also be proved that at the time that representation was made it was not the intention of the person making it to keep it. I add that reservation, because S. 16, Contract Act, includes under the head of "fraud" the making of promises without the intention of keeping them. That appears to me, and always has appeared to me, to introduce a very uncertain and dangerous element

5. (1871) 6 C P 486=40 L J C P 224.

9. (1908) 31 Mad 45.

into the doctrine of fraud as usually understood in the English Courts. I say "dangerous," because it is practically impossible to decide whether at the time of making the promise, the person making it intended to keep it or not. I much prefer to adhere to the old English rule that it is not a fraud merely to break promises or fail to perform obligations in futuro. Frauds, in my opinion, ought to be restricted to misrepresentations, and dishonest misrepresentations, of existing facts. But in the present case it could not seriously be contended that at the time of making the agreement, assuming that the case now set up by the plaintiff and defendant 1 is in all respects true, defendant 2 did not then intend to keep the promises he made to defendant 1. It is indeed the allegation of the plaintiff that defendant 2 really intended and wished to become the purchaser of this property to sell it shortly afterwards at a profit. It cannot then be upon the ground of fraud that defendant 1 or the plaintiff could be allowed to lead parol evidence and to set aside the written terms of the agreement. And, in my opinion, there is nothing in the language of S. 92, Evidence Act, nor in the principles to which that language is meant to and does give fairly accurate expression, which would justify the giving of parol evidence either by plaintiff or defendant 1, had the contest been confined to them, to vary any of the terms of the writing of 4th March 1914.

But it is said that this is a benami transaction and that in this country the law of benami is a special law in itself, in administering which the Courts need not look very strictly to the general rules of evidence or in fact to any other general principles of law, which may be taken to be suspended wherever necessary and to be in abeyance as soon as the province of benami is entered. I must own that it has always been a source of wonder and regret to me that the Courts of this country should have shown themselves so uniformly indulgent to what is called the system of benami. Doubtless, this was due to the very liberal, probably because uninformed, views which prevailed at the time when the foundation of that small corner of the structure of our Indian legal system was being laid down by

Lord Campbell. It is obvious from a perusal of the report of the proceedings in the case of *Dhurm Das Pandey v. Mt. Shama Soondri Dibiah* (7) tried by Lord Campbell in the year 1843, that the supreme authority in England had but a very hazy notion of the conditions prevailing in India, under which this system, doubtless peculiarly dear to the Oriental heart and disposition, had grown up, and that the learned Lord Chancellor had no hesitation in seeking further light from gentleman who do not appear to have been engaged in the case but were doubtless credited with much legal Indian experience. And if we trace the history of the law of benami throughout the judgments of the Privy Council and the Superior Courts in India, it will easily be seen that very great favour has been shown to this peculiar form of transaction on the assumption that it is closely connected with part of the English law of resultant trusts.

Over and over again I find in the judgments of the most eminent Judges expressions of favour in which we are told that the benami system is common over the whole of India and that there is nothing whatever objectionable in it. Something to that effect will be found in the very latest decision of the Privy Council, which I happened to read the day before yesterday, in the case of *Mt. Bilas Kunwar v. Desraj Ranjit Singh* (8) from the Allahabad High Court, the judgment being delivered by Sir George Farwell on 13th July 1915. And yet I have no hesitation in saying that any Judge with a large experience of legal work in this country and the manners and customs and morals of the litigants involved in cases directly bearing on the question would agree with me in saying that at least 80 per cent. of so called benami transactions contain a very large ingredient of fraudulent intent. There may be a very small percentage of cases in which this form is adopted out of feelings of superstition, as where a father buys a property in the name of a favourite son; but with that single exception (and even with respect to that I feel grave doubt), I do not believe that there is a single benami transaction, put through over

7. (1841-46) 3 M I A 229=6 W R 43 (PC).

8. A I R 1915 P C 96=37 All 557=30 I C 299=42 I A 202 (PC).

the whole of this great country of India, in which a sufficiently rigorous analysis would not discover fraudulent intent either in esse or in posse.

I cannot conceive why a practice of this kind should have flourished so long and been so popular if it had really been no more than a vehicle of honest dealing. I cannot conceive why those whose conduct and purposes are all honest should wish to conceal themselves and mask their transactions working cunningly and in the dark instead of, as might be expected of honest men, in the open light of day. Be that how it may, there does appear to be a magic in the mere word "benami," which predisposes all our highest judicial authorities in favour of any transaction offered to them under that label. But surely there must be some discrimination between what is a truly benami and what is not a benami transaction at all. And it would be no bad thing if the ground were cleared to that extent before very eminent Judges expressed their views on this branch of the law. I should doubt myself whether it would be possible to find any real benami transaction which was not strictly triangular. I do not understand how there can be a true benami transaction between two persons.

The simple meaning of benami is that a purchaser desires to buy property, but does not desire to buy in his own name and therefore buys it in the name of some one else. It is obvious that in every such transaction there must be three actors. There is the vendor; there is the real purchaser; and there is the nominal purchaser. Similarly, on an analysis of such cases they break up into different classes, in many of which but for the special doctrine of benami one would suppose that the relations of parties were governed simply and solely by the ordinary rules of agency. In other cases there is nothing resembling agency in the matter, as for example, where a father buys a property in the name of his infant child. It is clear here that the child is the benamidar, but could hardly be regarded as the agent of the father.

Now, in the present case, if the plaintiff's story be true, or I should say if the story originally put forth by the plaintiff and supported by defendant 1 be true, this should be an ordinary and

typical case of benami in contemplation. Defendant 2 desires to buy the property and does not desire to buy it openly and in his own name, for the very obvious reasons which I shall presently mention. He therefore puts up defendant 1, who is a person of no importance, as the nominal purchaser, and the contract is entered into between defendant 1 and the plaintiff. As this transaction never got beyond the stage of an agreement to buy, it becomes impossible to apply the test which has always been recognized by the highest judicial authority, namely, whence came the purchase money. But in a case of this kind suppose we adopt the test and ask, whence was the purchase money to come? Now, if that test yields the result that defendant 1 was not to pay the purchase money, but that defendant 2 was, then I suppose we might take it that this was a benami agreement to purchase and that defendant 1 was acting in it really as an agent for defendant 2; but I altogether fail to see why because we give the transaction as a whole the name of benami, the proof of it is not to be regulated by the general principles of evidence.

It is quite true that in a great many benami cases the attention of the Courts never seems to have been drawn to the difficulties thrown in the way of proving the real character of the transaction by the provisions of S. 92, Evidence Act. It is also quite true that in a majority of such disputes, which come before the Courts, S. 92 is not applicable. Where a transaction is truly benami, that is to say, where the purchase has been effected in the name of the nominal purchaser, the contract would be between the nominal purchaser and the vendor, and the dispute which the Court would have to settle would probably be restricted to the nominal and the real purchaser. Between them there would be no writing, and therefore no difficulty arising under S. 92. But there are cases, which, in my opinion, are not benami at all, in which the writing is made between the actual owner or purchaser and somebody else, who in this transaction is supposed to be his benamidar; as for example, where a person with the object of shielding his property from his creditors purports to sell it to some one named by himself and the sale-deed is accordingly made out in that

person's name as the purchaser. Now it is perfectly obvious that under S. 92, Evidence Act, it would not be open to parties to such a contract to give parol evidence of the true nature of the transaction underlying it; nor would this difficulty be surmounted or in any way touched by calling the transaction a benami transaction.

But it is also clear, as soon as the contents of the whole transaction are examined, that it is a case in which parol evidence might be given under S. 92 to serve a different purpose. For where the owner of property purports to transfer for consideration, his real purpose being to conceal or protect his property, it necessarily follows that the nominal purchaser has paid no consideration, and a party may always show that the transaction is bad for failure of consideration. Why I say that in these circumstances the transaction can never be correctly described as benami, is because a man cannot sell to or buy from himself and it is an essential of real benami transactions that they should involve three persons. In the latter class of cases, which I suppose were indirectly flitting through the minds of counsel who wished the Court to neglect S. 92 altogether, on the ground that the transaction was benami and anything and everything might therefore be proved, in the latter class of cases, I say, it is very clear that the ground upon which parol evidence may be given is the common ground open to everybody and not depending upon the rather hypnotising effect of the word benami, namely, that the nominal purchaser is not the real purchaser because he paid no consideration. Thus after having given my most careful attention to the arguments addressed to me by the learned counsel both for the plaintiff and for defendant 1 in support of their contention that parol evidence might be allowed, notwithstanding the terms of S. 92, Evidence Act, to show that while the agreement of 4th March 1914 has been executed by defendant 1 as principal, and by him alone, it was really an agreement between the plaintiff and defendant 2, I am still in very grave doubt to what extent such parol evidence would be admissible.

The position is further complicated by the plaintiff having joined defendant 2,

with defendant 1 in the suit. That having been done, defendant 1 at once attacked defendant 2 as upon proceedings against third parties, although some technical formalities were dispensed with in view of the fact that defendant 2 was already on the record. Now, as between these two, I cannot see any difficulty at all in allowing defendant 1 to prove, if he can, the true nature of any agreement which subsisted between defendants 1 and 2. But that is obviously a very different thing from allowing the plaintiff to prove that there was an oral agreement between himself and defendant 2. It is a different thing in itself and might have very different legal consequences. On the principle of the English cases such as *Higgins v. Senior* (1), *Caldert v. Dobell* (5), etc., I think I might safely have allowed the plaintiff, notwithstanding the provisions of S. 92 and the very grave doubts I entertain myself upon the correctness of the English doctrine, to give the go-bye to the agent, that is to say, defendant 1, and prove, overriding the section, that his agreement was really made with defendant 2. My second difficulty has been to decide whether the same position can be reached by allowing the plaintiff to proceed against both defendant 1 and defendant 2 together, and here he himself has ill-advisedly much complicated the matter by swearing, and refusing to be shaken out of it by any suggestions of his counsel, that he believed that defendant 1 and defendant 2 were literally partners in this transaction. I have no doubt that all that part of his evidence is absolutely untrue.

He adopted that line after the Court recess at a point in the case where the Court had suggested several difficulties in his way if the course originally indicated in the plaint were to be followed. But if the evidence as to the true nature of the agreement as a whole is admissible between defendant 1 and defendant 2 and if that evidence shows that defendant 2's part was something more than that of a mere guarantor of defendant 1, or rather the reverse that defendant 1 was a mere puppet and instrument of defendant 2, then how can I neglect the effect of that evidence in adjusting the legal rights and liabilities of the three parties to the suit? Even were the technical difficulties created

by the plaintiff having sued defendants 1 and 2 jointly insurmountable, still having regard to the rights which I think have been exercised, and rightly exercised, by defendant 1 in protecting himself against defendant 2 and the evidence thereby collected and laid before the Court, I should think that my duty as a Judge was to treat this now as evidence between all the parties and endeavour in the light of it to discover what the real facts of this transaction were and what are the legal rights and liabilities of the parties arising out of, and to be adjusted in relation to, those facts so found. If I am right so far, and have not been in error in admitting evidence to prove what the nature of this transaction was, then the case, in my opinion, would present no difficulty at all.

The agreement, as I have said, was made on 4th March 1914 and its term was six months, that is to say, the sale was to be carried through on or before 4th September 1914. The agreement recites that a sum of Rs. 500 earnest money was paid there and then in the presence of the attesting witness Dayaram to the vendor Anandrao. This is not true, but the fact is that on the following day Rs. 400, and not Rs. 500, was paid as earnest money either by Keshav, defendant 1, or by Punamchand defendant 2, to the plaintiff, or on his behalf to his attorneys Messrs. Smetnam, Byrne & Noble: see Exs. 8 and 9 relating to this transaction. Now, within a very short time of the making of this agreement, in the course of a suit brought by one Ramchandra Kondaji Kaduskar against the plaintiff, a consent order was made on 9th April 1914 by which, inter alia, the plaintiff Anandrao agreed not to deal with the property in any way. That consent order was in force when negotiations for the second mortgage for Rs. 4,000 were entered into with defendant 2, Punamchand in the present case. It will be observed that the consent order of 9th April 1914 was modified on 8th May 1914, although the undertaking not to deal with the property was maintained. Immediately after this the plaintiff began negotiations with defendant 2 to raise the sum of Rs. 4,000 on this property, and defendant 2's contention is that whether there had or

had not been the agreement between the plaintiff and Keshav on 4th March 1914, that agreement was cancelled by the plaintiff with the consent of Keshav before 9th May 1914, and presently, according to defendant 2, the plaintiff and Keshav, defendant 1, both returned their counterpart agreements of 4th March 1914 to him (Punamchand). The negotiations for this mortgage fell through owing to a demand made by Punamchand that out of the consideration money Rs. 4,000, Rs. 500 should be repaid to Keshav and Rs. 100 should be paid to himself. It was upon this matter that the attorneys of the parties at an interview of the 13th June finally split and the negotiations for the mortgage were broken off and the letter of the 13th June was written to Punamchand, defendant 2, by the plaintiff's attorneys.

In consequence of that letter the agreement of the 4th March, which Punamchand had obtained—whether in the way he describes or whether in the way the plaintiff describes is a matter of evidence—was duly returned to the plaintiff. And in the same letter a demand for specific performance of the contract was made. Now the moment the demand for specific performance was made upon defendant 2, Punamchand, he did not repudiate it on the ground that the plaintiff had disabled himself from the performance by his undertaking not to deal with the property, but he point blank denied that as far as he was concerned any such agreement to buy was ever made. Now, as I have said, the term of the agreement of the 4th March ended on the 4th September and it was not until the 27th November that the undertaking of 9th April 1914 was released under the consent decree disposing of the suit; and one of defendant 2's main contentions throughout has been that even if the Court were to hold that he had been a party to the agreement of 4th March 1914 and directly liable thereunder, that agreement had been cancelled by the plaintiff himself and the defendant 2 was otherwise absolved from any liability thereunder within the meaning of S. 39, Contract Act. At one time I thought that there was great force in that contention and had some hope of disposing of the suit upon that simple ground. Further

reflection, however, and the consideration of such cases as *Ellis v. Rogers* (9) and *Devenish v. Brown* (10), has convinced me that this line of defence will not avail defendant 2.

In the first place, I do not think that time was of the essence of this contract and I do not think that in any strict sense it could have been said on 13th June or about that period that the plaintiff had disabled himself by this undertaking from carrying out his part of the contract. If, for example, defendant 2 instead of altogether repudiating the contract had expressed his willingness to perform, provided the plaintiff could do so, within the stipulated period, I do not think that there was anything either in the suit in which the undertaking of 9th April was given or in the mortgage suit of Chichgar against the plaintiff, which need have disabled him on his representations properly made to the Court from carrying out the agreement of 4th March; but since defendant 2 unconditionally and without reservation repudiated the entire agreement, there was, I think, a complete breach on his part and it became unnecessary for the plaintiff to do anything more on his side to attempt to carry out his part of the agreement. In view of the attitude taken up by defendant 2, and it was really only against him that the plaintiff thought he had any remedy, it would have been foolish on the plaintiff's part to make any further advances. I think, therefore, that defendant 2's contention, that even assuming he had been a party to this contract, he is absolved from performance under S. 39, Contract Act, on the facts I have just stated, fails. Neither is there any other evidence, and this was virtually admitted by defendant 2's counsel, to prove directly the cancellation of the contract by the plaintiff.

It is perfectly clear that defendant 1 throughout the months of March, April and May was not seriously regarded by either the plaintiff or defendant 2 as interested substantially in the performance of the contract of 4th March, and I cannot find anything in the oral evidence which would warrant me in holding that defendant 2 had proved that the plaintiff had cancelled this contract some time

before 13th June 1914. It is only, as I understand, first upon grounds of law and S. 39, Contract Act, and next as urgent if not necessary inference from the admitted facts in connexion with the mortgage for Rs. 4,000, that defendant 2 now asks the Court to hold it proved that there must have been a cancellation of this contract. I have disposed of the purely legal point under S. 39. As to the other, I do not think that there is anything necessarily inconsistent with the continuance of the proposed contract for sale in September between the plaintiff and defendant 2 in what occurred between them relative to the raising of the small loan of Rs. 4,000 upon this property by way of a second mortgage in the meantime. And it is certainly surprising to find defendant 2, if one word of his general story were true, suddenly in possession of both the agreements of 4th March. Now, according to him, he was no more than a broker in that transaction and one of the original agreements was given to the plaintiff and the other to Keshav, the intending purchaser.

But according to defendant 2, as soon as the parties, that is to say, the plaintiff and defendant 1, had agreed to cancel the contract on account of the consent order of 9th April, both came to him with their agreements and made them over to him, saying that they were afraid that if they did not do so, he would suspect them of having cheated him out of his brokerage. Now this is perfectly ridiculous and is false on its face, and is of a piece with a very great portion of the evidence given by defendant 2. Indeed, his learned counsel, with the utmost candour at the close of the case, admitted that in view of the quality and transparent falsehood of a great part of that evidence he could not reasonably ask the Court to rely upon any statement made by his client; and that is an admission which, liberal enough coming as it does from the mouth of his own counsel, does not go in my opinion one inch beyond propriety or what the evidence actually given by defendant 2 in this case required. I do not wish to repeat the observations which I made during the addresses of counsel upon the evidence of the principal parties in this case. Suffice it to say that neither the plaintiff nor defen-

9. (1885) 29 Ch D 661=53 L T 377.

10. (1885) 26 L J Ch 23.

dant 2 has hesitated, wherever they thought desirable in their own interests to do so, to lie, and lie unblushingly, after the manner of their kind.

I am not at all sure that defendant 1 was really much better than the plaintiff and defendant 2, but he had not so difficult a part to play, and I am bound to say that, on the whole, he was not quite such a transparent perjurer as the other two. Now, reverting to the point which I was noticing, there is a conflict of testimony between all three of these witnesses. Defendant 1 swears that he never had the agreement in his possession at all. The plaintiff swears that defendant 2 came to him a short time after the agreement of 4th March had been executed and said that as he had a purchaser negotiating with him, he would be glad to have the agreement from the plaintiff. He gave as his reason that his own house, where the other counterpart lay, was at Mazagon, a long way off; and so the plaintiff handed him over his copy of the agreement of 4th March. Defendant 2, as I have said, says that defendant 1 and the plaintiff came to him of their own accord and handed him back each his copy of the agreement of 4th March. Of these three stories I have no doubt that that of defendant 1 is true, that is to say, that he at least never had a copy of this agreement at all.

The agreement, I have not the slightest doubt, was entered into between the plaintiff and defendant 2 as alleged both by the plaintiff up to a certain point and before he took to lying under a mistaken notion of his legal position, and defendant 1 who was merely introduced as a figurehead to conceal the identity of defendant 2. That being so, it is natural that the two agreements prepared by Dayaram would remain with the two real principals, that is to say, one with the plaintiff and one with defendant 2. And I have no doubt, or but little doubt, that the manner in which defendant 2 became possessed of the plaintiff's copy of the agreement has been correctly told by the plaintiff. I entertain very little doubt, as I said a short time ago, about the truth of the whole matter. I must allow myself a certain amount of conjecture, but it is a conjecture founded

upon facts which appear to me to be indisputable and virtually to give conclusively the outline of the whole scheme.

In my view the object of the transaction was simply this: Defendant 2, who is a member of a marwari-money-lending firm (about the constitution of which he lied and lied with his usual hardihood), thought he had a purchaser for this property at a figure of Rs. 36,000. He agreed to buy it from the plaintiff for Rs. 34,000. But it is obvious that if he did this openly in his own name with the firm's moneys, any profits that the sale might yield would be divisible between him and his partners. Hence the introduction of defendant 1, who is a coolie or muccadum and I think a man of no substance. He had been habitually borrowing from defendant 2, and defendant 2 could very easily put pressure upon him. The service he was asked to render to his powerful creditor appeared to be of the slightest. It was merely to lend him his name in a transaction, which I do not doubt Punamchand expected to bring to a satisfactory conclusion within a very short time. Now, if I am right, Punamchand's idea was to advance from his firm the purchase money to Keshav at the usual rate of interest. Then to sell the property to the purchaser at a profit of Rs. 2,000, let us say. Then to make Keshav repay the firm with interest, and he, Punamchand, to pocket the balance, say Rs. 2,000 or thereabouts, plus brokerage in the two transactions. That is a scheme which would be almost irresistibly attractive to any Marwari. It would not only be thoroughly dishonest as well as profitable but would have the piquant relish of being dishonest at the expense of those to whom he was bound by fiduciary relations.

Now, having so far prepared the way, we find in the evidence a picture of the pecuniary status of defendants 1 and 2, which, in my opinion, points very directly to defendant 2 having been the intending purchaser of this property. Indeed everything in the case appears to me to point the same way. I do not see why defendant 1 should have embarked of a sudden on such a large enterprise as the purchase of a house worth Rs. 34,000. That would be an immense sum to him, though a mere fleabite to defendant 2. Then, we have the evidence regarding

the payment of the earnest money; and here, again, it is as clear as daylight that it was really defendant 2 who paid that money in the usual Marwari fashion, cutting out just one-fifth of it upon one pretext or other and later on demanding one-sixth extra; and again, Marwari fashion, as soon as the matter became of importance and the subject of litigation in this Court he endeavours to support his untrustworthy story, that it was defendant 1 and not himself who paid the earnest money on 5th March, by a deliberate forgery. The story he has laid before the Court relating to this advance of Rs. 500 to Keshav in order to enable him to pay the earnest money on 5th March, supported by the receipt which he undoubtedly endeavoured to have made out in that way by Messrs. Smeethan, Byrne and Noble, is, in my opinion, a tissue of deliberate lies. He had the effrontery to tell the Court that he habitually destroys his nondhs or rough memorandams from which the fair cash book is written.

I am quite certain that no Marwari does anything of the kind. By way of giving a realistic touch he adds that these nondhs and other books of his firm are used to wrap up bundles of small silver change. The truth of the matter is that he has got an entry in his fair cash book and in the ledger the entry has been doctored. Without the nondhs it would be quite impossible for this Court to attach any importance whatever to the entry in the fair cash book. It is as certain as anything can be that that nondh was in defendant 2's possession at the time this suit was filed and probably still is. It is also certain, humanly speaking, that its protection would not have assisted this part of defendant 2's case. On the contrary, the manifest alteration of the figure of 187 into 687 indicates clearly enough the quality of defendant 2's evidence on this point. I am not going further into the details of the evidence touching the making of the agreement of 4th March and the part played in it by Dayaram, the managing clerk, and the numerous features of the transaction as a whole, which leave no doubt in my mind, and I am sure would leave no doubt in the mind of any person who heard the evidence given, as to the real nature of this transaction. It was quite clearly Punamchand's transaction

throughout and it is equally clear that the plaintiff knew that it was so. Keshav was appearing as Punamchand's catspaw or benamidar with the sole object of cheating Punamchand's partners. For some time I pressed the witnesses with questions in order to see whether I could not lay a foundation for deciding that inasmuch as the whole transaction was tainted with immorality, the Court ought to refuse relief within the spirit and meaning of S. 23, Contract Act.

But although I have no doubt that from Punamchand's point of view the transaction was as thoroughly immoral as any need be to come within the prohibition of that section, I cannot see that from the plaintiff's point of view there was anything improper in his desire to sell his house for a given price, or that it need be presumed that he was concerned with Punamchand's motives for buying under this benami cloak. As to defendant 1 it is quite as likely that he neither knew nor cared why defendant 2 wished to make use of his name. It may be argued that if this was the object of defendant 2 in March, why was he so anxious to be out of the agreement in May. It is very clear that for some reason, probably on account of Chichgur's mortgage or the suit of Ramchandra Kondaji Kaduskar, or possibly upon better information regarding the value of the property, defendant 2 wished to have the agreement of 4th March cancelled. This is only too evident from the insistence with which he demanded the repayment of Rs. 500 to Keshav out of the Rs. 4,000 he agreed to advance to the plaintiff on a second mortgage. He wanted thus to make evidence of the rescission of the contract of 4th March. Otherwise upon his own showing there is no conceivable reason why he should have been so solicitous for the repayment of the money to Keshav. In my opinion, defendant 2 had sufficient reason for wishing to be quit of the agreement of 4th March and did all in his power to get it cancelled and indirectly to procure evidence of the rescission. He was foiled in the latter attempt by the vigilance of the plaintiff's attorneys. There are many conjectural reasons which suggest themselves why defendant 2 should not have desired to carry out the agreement of 4th March; but if the plaintiff had really cancelled it as alleged by de-

fendant 2, it is strange to find him insisting on 17th June upon its due performance by defendants 1 and 2.

I have no hesitation whatever in holding upon the facts (though I have very great hesitation in holding that I am entitled to look at all the evidence as I have done in this connexion) that the real agreement of 4th March 1914 was made between plaintiff and defendant 2, and that defendant 1 was merely a benamidar, acting within the knowledge of plaintiff and defendant 2 as the agent of the latter for the purpose of signing and executing an agreement to buy. That being so, and the parties being arrayed, as they are here, the question remains to be answered, how should damages be assessed. It will be observed that at a late stage in the case the plaintiff abandoned his claim for specific performance. No evidence whatever has been given here of damages, although Mr. Davar on behalf of the plaintiff indicated the simple basis upon which he thought a fair calculation could easily be made. Before awarding damages therefore against one or both the defendants, it will be necessary to take formal evidence along the lines indicated by Mr. Davar.

G.P/R.K.

Suit decreed.

A. I. R. 1916 Bombay 251

MACLEOD, J.

Textile Manufacturing Co., Ltd. — Plaintiffs.

v.

Salomon Brothers—Defendants.

Original Civil Suit No. 252 of 1915, Decided on 12th November 1915.

Contract Act (1872), S. 56 (2)—Contracts with alien enemy become illegal on outbreak of war.

All contracts with alien enemies become illegal on the outbreak of war. [P 252 C 2]

In February 1914 the defendants agreed to purchase from the plaintiffs certain goods during the year ending 31st December 1914 and to take delivery at least once monthly. The defendants were a German joint stock company, having a branch in Bombay under the sole management of a German subject. On account of the war and the various Proclamations and Ordinances issued, the defendants failed to take delivery of the goods as agreed. The plaintiffs sold the goods at a loss, and after deducting the value of the deposit with them, made by the defendants against fulfilment of the contract, sued the defendants for the balance :

Held : that the contract became illegal and was dissolved on the declaration of war on 4th August 1914. [P 252 C 2]

Held also : (1) that it had become impossible

owing to circumstances arising from the outbreak of war for the defendants to perform their part of the contract : [P 254 C 2]

(2) that even assuming that it only became so after the Hostile Foreigners Trading Order dated 14th November, the plaintiffs, inasmuch as they gave the defendants further time for taking delivery up to 16th December, waived any breach committed before that date. [P 255 C 1]

(3) That, on the above findings the defendants were entitled to a return of their deposit under S. 56 (2). [P 255 C 1]

Weldon and Strangman—for Plaintiffs.

Moos and Campbell—for Defendants.

Judgment.—By a contract, dated 18th February 1914, the defendants agreed to purchase from the plaintiffs the total quantity of waste of the several descriptions specified in the contract produced in the plaintiffs' mills during the year ending 31st December 1914, at the respective prices specified in the contract and to take delivery of whatever waste might be ready at least once monthly.

The defendants deposited with the plaintiffs 3½ per cent. Government Promissory Notes of the face value of Rupees 2,200 to be retained by the plaintiffs against the fulfilment of the contract. The defendants are a German joint stock company incorporated under the laws of Hanover, having a branch in Bombay, under the sole management of one Carl Beyer, a German subject. On 4th August 1914, war was declared between Great Britain and Germany. On 18th August, the plaintiffs wrote to the defendants calling upon them to take delivery of waste under the contract. Mr. Beyer replied on 22nd August that on account of the present political position they were not allowed to do business in India and requested the plaintiffs to keep the delivery of waste standing over until business was allowed to be resumed.

On 11th November, plaintiffs again called upon the defendants to take delivery of the waste under the contract. Defendants replied on the 13th that they were unable to arrange for further delivery until the declaration of peace. On 3rd December, plaintiffs called upon the defendants to comply with their notice of 11th November on or before 8th December. The defendants replied through their solicitors on 9th December and plaintiffs' solicitors by their letter of 12th December extended the

time for taking delivery until 16th December. Defendants' solicitors replied on the 18th referring to the internment of the defendants' Manager on 5th September and claiming that under S. 56 (2), Contract Act, the defendants were relieved from the performance of their part of the contract. On 16th February 1915, the plaintiffs' solicitors informed the defendants that they had sold the waste of which the defendants had been under contract to take delivery at a loss of Rs. 4,270-13-0 and after deducting the value of the deposit demanded payment of Rs. 2,074-13-2.

The plaintiffs filed this suit on 11th March. Three main contentions are raised by the defendants' written statement. First, that on the outbreak of war, as the defendants were alien enemies, the contract was avoided and both parties were absolved from any performance under it. Secondly, that the defendants were prohibited by reason of their status as alien enemies from engaging in or carrying on trade and that though the defendants applied to the Local Government for permission to carry on their local business, it was not until 8th February 1915 that they obtained a licence limited to the winding-up and liquidation of the defendants' local business under Government supervision. Therefore it became impossible for the defendants to perform their part of the contract. Thirdly, that if there was a breach of the contract it was waived by the plaintiffs granting an extension of time for performance until 26th December, and before that date the order of 14th November made it impossible for the defendants to perform their contract.

This is not the case of a contract between a British subject and an alien enemy having a commercial domicile outside enemy territory. But even if it were, I am not prepared to adhere to the hitherto accepted doctrine that domicile and not nationality is the test. That doctrine was established when wars were waged under very different conditions and it is certainly desirable that it should be reconsidered. The defendant company is registered in Germany and its business is managed and controlled from Germany. Mr. Beyer acted under instructions from headquarters and especially in the case of

the contract in suit he sent samples of the waste to headquarters for approval, since the waste was intended for export to Germany. Therefore the defendants have a German residence and domicile: *De Beers Consolidated Mines, Ltd. v. Howe* (1).

Nor does the question arise whether the contract is merely suspended during the duration of hostilities, as the period of the contract expired before there was any likelihood of hostilities coming to an end. The more modern view seems to be that all contracts with alien enemies become illegal on the outbreak of war: see per Lord Lindley in *Janson v. Driefontein Consolidated Mines, Ltd.* (2). In *W. Wolf & Sons v. Carr, Parker & Co., Ltd.* (3) the defendants, a Manchester firm, were sued by the plaintiffs, a German firm, whose partners were resident and domiciled in Germany and had their principal place of business in Germany with branches in Manchester and other places, for the recovery of £1,342-8-6 partly for goods sold and delivered and partly as damages for breach of contract. The plaintiffs relied on Cl. 6 of the Proclamation of 9th September 1914, but it was held by the Court of Appeal that there was nothing in that clause which enabled the plaintiffs to recover where otherwise as alien enemies they would not be entitled to do so. On the outbreak of war, the contracts between the plaintiffs and defendants became illegal contracts and were dissolved and there has been since then no transaction between the parties within the meaning of Cl. 6. The plaintiff's contention was that Cl. 6 enabled an enemy to sue in respect of obligations entered into before the war, but as the plaintiffs were not suing in respect of any transaction authorized by or coming within Cl. 6 it was held that they were not entitled to maintain the actions under its provisions.

This decision was followed by Bray, J., in *Kreglinger & Co. v. Cohen* (4), where the plaintiffs were a Belgian Company carrying on business in Antwerp and London and the defendant was a German carrying on business in Hamburg, and the claim was for

1. (1906) A C 455=75 L J K B 858.
2. (1902) A C 484=71 L J K B 857.
3. (1915) 31 T L R 407.
4. (1915) 31 T L R 592.

damages on a contract entered into before war broke out.

Another decision to the same effect has been reported in the newspapers, though it has not yet appeared in any of the Law Reports. These decisions follow a simple principle consonant with common sense and capable of universal application, thereby avoiding the many troublesome questions which must arise otherwise, to what should be done during the continuance of hostilities, and what should be the position of the parties when hostilities cease. There may be hardships in individual cases, but it is obvious that it is better to allow the parties, if they so wish, to renew their contracts at the end of the war, rather than bind them to continue business under the prior contracts when it is almost certain that the surrounding circumstances will be entirely altered. I must decide therefore that the contract in suit became illegal and was dissolved on 4th August.

But apart from that it is quite clear that owing to the outbreak of war subsequent events rendered it impossible for the defendants to perform their contract. Mr. Beyer financed his local transactions by a credit opened at the instance of the defendants with the Chartered Bank and, on 13th August, he received a notice from them that he could, under the law, only draw on his account for current expenses or wages. All further business dealings were prohibited until he got a permit to trade from Government. Then, on 5th September, Mr. Beyer was interned and as his power of attorney did not give him power to delegate his authority he was unable to carry on the business. He did give a power of attorney to Mr. Save but he clearly had no authority to do this, and this power was therefore valueless. In addition to these facts the various Proclamations, Ordinances and Orders relating to trading with the enemy have been referred to and it may be as well to analyse these. On 7th August 1914, the Government of India published the Royal Proclamation of 5th August.

After reciting that it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial intercourse with any person resident, carry-

ing on business or being in the German Empire without Our permission, all persons resident, carrying on business or being in Our Dominions are warned inter alia, not to supply to the German Empire any goods, wares or merchandise or to supply the same to any person resident, carrying on business or being therein nor to trade in or carry any goods, wares or merchandise destined for the German Empire or for any person resident, carrying on business or being therein.

But it is declared that where any person—and person includes any body of persons, corporate or incorporate—has or had an interest in houses or branches of business in some other country as well as in Our Dominions or in the Dual Empire, as the case may be, the Proclamation shall not apply to the trading or commercial intercourse carried on by such person solely from or by such houses or branches of business in such other country. This Proclamation was revoked by the Proclamation of 9th September which was substituted therefor. Therein the expression "enemy" was defined as meaning any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but not including persons of enemy nationality neither resident in nor carrying on business in the enemy country :

"All persons resident, carrying on business or being in Our Dominions are warned, inter alia, not directly or indirectly to supply to or for the use or benefit of an enemy country, or an enemy any goods, wares or merchandise, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for an enemy country or an enemy."

But under Cl. 6 it is provided that where an enemy has a branch locally situated in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy.

Under Cl. 8 nothing in the Proclamation shall be taken to prohibit anything which shall be expressly permitted by our licence, or by the licence given on our behalf by a Secretary of State or the Board of Trade, whether such licences shall be especially granted to individuals or be announced as applying to classes of persons.

By Cl. 3 of a Proclamation dated 8th October, the power to grant licences on Our behalf vested in a Secretary of State by the above clause may be exercised in India by the Governor-General. On 14th October 1914, the Government of India passed an Ordinance to amend the Foreigners Ordinance (3 of 1914) of 20th August whereby sub-Cl. (d) was added to Cl. (2) of the prior Ordinance, giving to the Governor-General in Council power by order to provide that foreigners residing or being in British India shall be prohibited from carrying on trade or business or from dealing with any property movable or immovable or shall only carry on trade or business subject to such conditions and restrictions as the Governor-General in Council may impose or shall deal with any such property in such manner as the Governor-General in Council may direct. In pursuance of such powers an order called the Hostile Foreigners Trading Order was issued on 14th November. Cl. 4 directs that a hostile foreigner shall not, neither shall a hostile firm, carry on or engage in any trade or business in British India except under a license issued by or under authority of the Governor-General in Council and to such extent and subject to such conditions, restrictions and supervision as the Governor-General in Council may direct.

Under Cl. 6 a hostile foreigner who or a hostile firm which, has been refused a licence or has failed within one month from the date of the order to apply for a licence shall (unless exempted by the terms of any general licence issued under the order) forthwith cease to carry on or engage in any trade or business in British India. But although nothing appears in the proclamations regarding the issue of licences to trade to hostile foreigners before 9th September, and nothing in the Ordinances or Orders of the Government of India before the Order of 14th November, under the Common law the King's subjects cannot trade with an alien enemy, i. e., a person owing allegiance to a Government at war with the King without the King's licence. It would appear from other documents in the case that the defendants had applied soon after war broke out for a license to trade, and their application had been considered by the Local Government. On 2nd September,

the Secretary to Government forwarded to the defendants copies of three Press Notes dated 28th August on the subject. In the first it is stated that in the case of firms which are wholly German or Austrian, licence under Royal authority is necessary to enable them to continue their trade.

The second refers to an official Notification of policy regarding trading with the enemy published by His Majesty's Government in which it is stated, inter alia, that no payments or other operations with firms in hostile territory are permissible during war under contracts made before the war, except that there is no objection to payments for goods delivered or services rendered when the contract has been in other respects completed before war, and that the question whether contracts made before the war are suspended or terminated depends on circumstances. But trade with a branch in British or neutral territory of a firm having head-quarters in hostile territory is permissible, apart from prohibition in special cases, as long as trade is bona fide with the branch and no transactions with head offices are involved. The third note notifies certain announcements pending final orders to be passed under the Trading Licence Ordinance, for the clearing of imported goods by hostile firms and the acceptance of delivery of goods by British subjects from hostile firms.

No Trading Licence Ordinance appears in the official publication of legislation and orders relating to the war. It is not to be wondered at, that confronted with this bewildering array of Proclamations, Ordinances, orders and official communications, abounding in conflicting provisions the members of the mercantile community in Bombay, whether British subjects, foreigners or enemies, remained paralyzed—unable to form any opinion as to what they could do or what they could not do. The plaintiffs themselves evidently realized this as, after their letter of 18th August, they made no attempt to get the defendants to take delivery until 11th November. In my opinion therefore it had become impossible owing to circumstances arising from the outbreak of war for the defendants to perform their part of the contract. Even assuming that it only became so after 14th November, the plaintiffs gave

the defendants further time for taking delivery up to 16th December, and so waived any breach committed before that date. It is admitted that on these findings the defendants are entitled to a return of their deposit under S. 56 (2), Contract Act. As this is a test case arising from the outbreak of war on which it was necessary to obtain the opinion of the Court, there will be no order as to costs.

G.P./R.K.

Suit dismissed.

A. I. R. 1916 Bombay 255

BATCHELOR AND SHAH, JJ.

Mahomed Beg Amin Beg—Appellant.

v.

Narayan Meghaji Patil and others—
Defendants—Respondents.

Second Appeal No. 198 of 1915, Decided on 16th November 1915, from decision of Asst. Judge, Khandesh, in Appeal No. 162 of 1911.

Mahomedan Law — Pre-emption — Khandesh District.

There is no custom of pre-emption recognized in the District of Khandesh, nor can the right of pre-emption according to Mahomedan law be enforced there solely as a matter of justice, equity and good conscience. [P 256 C 1, 2]

D. C. Virkar—for Appellant.

P. B. Shingne—for Respondents.

Batchelor, J.—The plaintiffs, who are the appellants before us, are two Mahomedan women, and they brought this suit to enforce their right of pre-emption in respect of two agricultural survey numbers which were sold by defendant 2, a Mahomedan woman, to defendant 1, a Hindu. The plaintiffs own the fields adjoining the land sold. The suit is from a village in the Nandurbar Taluka of the Khandesh District. Both Courts have held that the Mahomedan right of pre-emption does not exist in the Khandesh District and have accordingly dismissed the suit.

It is to be observed that no attempt was made in the trial Court to prove the right of pre-emption as a special custom or usage; but the plaintiffs relied exclusively on the doctrine of Mahomedan law. It is now contended on behalf of the plaintiffs in this appeal that the Mahomedan rule of pre-emption exists in the District of Khandesh and should be enforced here, notwithstanding that the purchaser was a Hindu. This contention is based on Cl. 26, Regn. 4 of 1827 and the reference there occurring to "the

law of the defendant." Seeing that the principal defendant here, the purchaser of the property, is a Hindu, the appeal, it seems to me, would be exposed to many difficulties, even if the Court conceded the appellants' primary argument that the Mahomedan rule of pre-emption was operative in Khandesh. But, in my opinion, that argument cannot be conceded. Cl. 26 of the Regulation of 1827 is as follows:

"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of special law and usage, justice, equity and good conscience alone."

It is admitted in argument that the phrase "Regulations of Government" must today include the Acts of the Indian Legislature governing the sale of immovable property, that is to say, the Contract Act and the Transfer of Property Act. That being so, there does not here exist that absence of Regulations which alone permits the Court to have recourse to "the law of the defendant," and the appeal must be decided by reference to the Acts, not by reference to the defendant's personal law. It is urged that the Transfer of Property Act and the Contract Act are merely silent upon the question whether the rule of pre-emption survives. But the answer, in my opinion, is that that rule cannot be recognized unless the provisions and principles of these Acts are disregarded. For the rule is a clog or fetter upon that freedom of sale for which the Acts provide. This becomes, I think, the more clear if a comparison is made between Ch. 3, Transfer of Property Act, which deals with sales, and Ch. 2, which deals with the general principles of the transfer of property and contains provisions regarding vested and contingent interests, or Ch. 4, which deals with gifts. By S. 2 (d) of the Act it is enacted that

"nothing in the second chapter shall be deemed to affect any rule of Mahomedan law,"

and S. 129 of the Act contains a similar provision saving the rules of Mahomedan law in regard to gifts. But the sections as to sales are quite general and contain no such restriction. Therefore I do not think that the appellants can succeed by virtue of this doctrine as a naked rule of law. The pertinent rules

of law, as I think, are those to be found in the Statute. This view is in accordance with the judgment of the Holloway, Ag. C. J., in *Ibrahim Saib v. Muni Mir Udin Saib* (1) and, in my opinion, that decision is applicable generally to this Presidency with the exception of Guzerat. It is true that the Mahomedan rule of pre-emption, at least as between Musalman litigants, is accepted by the High Courts of Allahabad and Calcutta. But this circumstance, so far from assisting the present appellants, really supplies, as I think, another sufficient reason for dismissing the appeal. For in the United Provinces and Bengal, owing to local conditions which are not reproduced in this Presidency, there has been a course of judicial decisions in favour of the recognition of pre-emption; whereas in this District of Khandesh there is admittedly not a discoverable instance in which this right has been either allowed by the Court or even asserted by any litigant. And this fact, which I think is true of the Presidency generally except Guzerat, affords conclusive evidence that to enforce the rule of pre-emption now would be to introduce into the law of property an innovation which is as foreign to the practice of the people as it is to the Statutory law. I desire to say nothing as to what the result would be if there were evidence in this case establishing a local custom in favour of the rule of pre-emption. For a custom is a local common law as it existed before the time of legal memory, as was said by Jessel, M. R., in *Hammerton v. Honey* (2). And I see nothing in Cl. 26 of the Regulation which would prohibit the Court from giving effect to the established local custom in modification of the provisions of the Act, though whether the Court would do so or not is a matter which it is not now necessary to determine.

From what I have already said it follows that, in my opinion, the appellants could not succeed under the Regulation even if they were able to show that the rule of pre-emption should be accepted by us as a rule of justice, equity and good conscience. Out of respect however to the arguments which have been heard upon the point, I will state that my own opinion is that this Court can-

not recognize such a rule as a rule of justice, equity and good conscience. The decisions in *Dada Honaji v. Babaji Jagushet* (3) and *Waghela Rajsanji v. Shekh Masludin* (4) are authorities for the view that it is to the English law in general that we must look for guidance as to what is a principle of justice, equity and good conscience. And this particular rule, as I have said, is not in accordance with the principles of English law. On this point I desire to express my concurrence with what was said by Phear, J., in *Nusrut Reza v. Umbul Khyr Bibee* (5) :

"The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Mahomedan family arising out of their minute sub-division and inter-division of ancestral property; and as the result of its exercise is generally adverse to public interest, it certainly will not be recognized by this Court beyond the limits to which those necessities have been judicially decided to extend."

It seems almost unnecessary to add that the rational basis and justification for the rule of pre-emption has largely, if not entirely, disappeared in the mofussil on this side of India. As to the position in Guzerat upon which much was said in argument, that is now not so clear as it was, since the earlier decisions have been questioned by Beaman and Macleod, JJ., in *Dahyabhai Motiram v. Chunilal Kishoredas* (6). Whether the earlier decisions should still be followed is a question upon which, since the point does not now arise, it would be improper for me to express an opinion. I may however say just this, as the result of considerable experience as District Judge of Ahmedabad, that the judicial recognition of pre-emption in Guzerat, particularly amongst Hindus in that province, has always appeared to me anomalous and artificial. On these grounds I am of opinion that the appeal fails and should be dismissed with costs.

Shah, J.—I am of the same opinion. I desire to state briefly the grounds upon which I have arrived at the same conclusion. The lower Courts have rejected the plaintiffs' claim for pre-emption, and the dispute now is substantially between the pre-emptors and the purchaser of the agricultural lands in suit. Under Cl. 26, Regn. 4 of 1827,

3. (1864-66) 2 B H C R 36.

4. (1837) 11 Bom 551=14 I A 89 (P C).

5. (1867) 8 W R 309.

6. AIR 1914 Bom 120=38 Bom 183=22 I C 289.

1. (1870-71) 6 M H C R 26.

2. (1876) 24 W R (Eng) 603.

"the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage, of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice equity and good conscience alone."

On behalf of the purchaser it is urged that the Transfer of Property Act and the Contract Act are applicable to this case, that there is no saving clause in favour of the Mahomedan law of pre-emption, that the provisions of the Acts are inconsistent with the right of pre-emption, and that the rules as to pre-emption must be deemed to have been abrogated by these Acts. There is considerable force in this argument. But Mr. Shingne has not been able to suggest any satisfactory answer to the two difficulties, which present themselves in the way of accepting it. Firstly, in spite of these Acts, the right of pre-emption according to Mahomedan law has been enforced in virtue of the usage of the country in certain parts of India outside this Presidency, and in Guzerat, or at least in certain parts of Guzerat, in this Presidency. Secondly, Ch. 3, T. P. Act, which relates to sales of immovable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and the buyer, in the absence of a contract to the contrary. I therefore hesitate to accept Mr. Shingne's contention. Assuming however without deciding, that there is no statutory provision applicable to the case, it is clear that the plaintiffs cannot rely upon the usage of the "country," as both the lower Courts have held that there is no custom of pre-emption recognized in the District of Khandesh and that there has been no instance of the right of pre-emption having been exercised in that District.

The law of the defendant cannot justify, in my opinion, the application of a special rule of Mahomedan law to a case of this kind, in which there are two defendants, one a Mahomedan and the other a Hindu, the latter being substantially interested in his own right. There has been some difference of opinion in other parts of India as to whether a non-Mahomedan purchaser buys the property subject to the right of pre-

emption according to the Mahomedan law. It may be that there is good reason for the view that the non-Mahomedan purchaser buys the property subject to the right of pre-emption in those parts of the country where such a right is enforced on the ground of usage or as a rule of Mahomedan law. But that reason, as I understand it, is not that it is "the law of the defendant," but that it is in accordance with justice, equity and good conscience to enforce the right of pre-emption against the non-Mahomedan purchaser in such a case. Lastly, it is argued by Mr. Virkar that the right of pre-emption should be enforced as a rule of justice, equity and good conscience. I am quite unable to accept this argument. I agree generally with the observations relating to this point in *Ibrahim Saib v. Muni Mir Udin Saib* (1) and hold that the right of pre-emption according to Mahomedan law cannot be enforced solely as a matter of justice, equity and good conscience.

Mr. Virkar has relied upon the case of *Gobind Dayal v. Inayatullah* (7). The conclusions of Mahmood, J., in that case cannot apply to the present case, as the words of S. 24, Bengal Civil Courts Act, upon which they are based are materially different from the words of S. 26, Bombay Regn. 4 of 1827. The other Judges in that case apparently based their conclusion upon the ground stated in the judgment of Oldfield, J., that on grounds of equity the Mahomedan law in claims of pre-emption had always been held to bind Mahomedans and had always been administered between them. The Mahomedans were found as between themselves to hold property subject to the rules of Mahomedan law, and it was not considered equitable that persons, who were not Mahomedans but who had dealt with Mahomedans in respect of property knowing perfectly well the conditions and obligations under which the property was held, should merely, by reason that they were not themselves subject to Mahomedan law be permitted to evade those conditions and obligations. This reasoning cannot apply to cases arising in a district where the right of pre-emption is not shown to have been exercised even as between Mahomedans, and where the persons not themselves subject to Mahomedan law.

7. (1885) 7 All 775.

cannot be properly held to know that a Mahomedan holds the property in that District subject to the obligation of offering it to his neighbours before selling it to a stranger.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 258

MACLEOD, J.

P. Nusservanji & Co.—Plaintiffs.

v.

Wartenfels—Defendant.

Original Civil Suit No. 1 of 1914, Decided on 20th January 1916.

Practice—Costs—Suits by or against Government.

In suits by or against Government in which costs might be awarded to Government, the bill of costs must be taxed without reference to the arrangement which exists between the Government and its legal advisers with regard to their remuneration. [P 260 C 1]

Kanga—for Plaintiffs.

Jardine—for Defendant.

Judgment.—This is an application to review the certificate of the Taxing Master. On 18th September 1914, the plaintiff filed this suit against S. S. Wartenfels then lying in Bombay harbour to recover the price of coal, supplied to her before she left Bombay in July 1914. The vessel was the subject-matter of certain proceedings in Prize in the Court of the Resident at Aden and had been handed over to the Bombay Government by an order of that Court, dated 4th September. The Secretary of State, therefore, became defendant on intervention in the suit which was eventually dismissed as against him and the plaintiffs were ordered by the decree to pay his costs of the suit when taxed. The defendant, accordingly, brought in his bill of costs for taxation. On such taxation the plaintiff contended that only such sums as had been disbursed by the defendant's solicitor on his behalf should be allowed and that as the defendant employed a solicitor on a fixed salary and also paid a fixed monthly sum to the Advocate-General, who was expected to conduct all Crown cases on the Original Side of the High Court, all profit, costs and brief fees to the Advocate-General should be disallowed. It is unfortunate that no evidence was placed on the record to show the exact terms of the arrangement which existed between the defendant and his legal advisers with regard to their remunera-

tion, but it was admitted during the argument before me that the question for decision was whether the defendant was entitled to have his bill of costs taxed without reference to any such arrangement or whether only actual disbursements should be considered on taxation and the remaining charges disallowed altogether. The law to be applied is the common law of England.

The identical question arose in *Azim-ulla Saheb v. Secy. of State* (1), confirmed on appeal in the case of *Muhammad Alim Oollah Sahib v. Secy. of State* (2); and it was decided that an arrangement between Government and their solicitor, whereby the latter receives a fixed salary and in addition the costs awarded to Government in any litigation, would not affect a party condemned to pay costs to Government. It cannot be disputed that at common law costs are awarded to a successful party as an indemnity for the expenses legitimately and reasonably incurred in fighting the action. As stated by Bramwell, B., in *Harlod v. Smith* (3), costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is also ascertained.

It would, therefore, follow that a successful party cannot recover anything beyond expenses actually incurred or for which he is liable.

No doubt in *Raymond v. Lakeman* (4), where the purchaser's solicitor received a fixed salary, there is a dictum of the Master of the Rolls to the effect that a party who has to pay costs is not entitled to the benefit of a private arrangement between his opponent and his solicitor as to costs, but it does not appear that the solicitor was to get the costs recovered in addition to his salary. In *Gundry v. Sainsbury* (5) that dictum was not even referred to. The plaintiff's solicitor agreed with his client to conduct his case in the County Court with-

1. (1892) 15 Mad 405.

2. (1894) 17 Mad 162.

3. (1860) 5 H & N 381=29 L J Ex 141.

4. (1865) 34 Beav 584=145 R R 682.

5. (1910) 1 K B 645=79 L J K B 713.

out charging him anything. The plaintiff was awarded £. 15 damages, but in the course of his evidence he admitted that he had arranged with his solicitor not to pay the costs of the action, consequently counsel for the defendant asked the County Court Judge to enter judgment for the plaintiff for £. 15, but without costs, on the ground that under the proviso to S. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under his agreement. It was contended by the plaintiff that as the agreement was verbal the proviso to S. 5 had no application. The learned County Court Judge held that the agreement need not be in writing and gave judgment for £.15 without costs. The Divisional Court upheld this decision. Before the appeal Court it was contended for the respondent that the proviso to S. 5 of the Act of 1870 simply reaffirmed the Common law doctrine. It was held that it was only when the agreement was set up by the solicitor that the Statute required it to be in writing, and that the case would be decided under the Common law. Buckley, L. J., remarked:

"Suppose the Act of 1870 does not apply. Then the client comes to the Court and says: 'This is a matter in respect of which I am entitled to get costs because I have been put to expense, and the law as administered in this Court allows me in that state of things to be indemnified by the defendant to the extent of party and party costs.' But he having come to assert that right, the Court says: 'True, you are entitled to such indemnity, but inasmuch as you have nothing to pay by reason of your agreement with your solicitor there is nothing for which to indemnify you.'"

The Assistant Taxing Master has distinguished that case, on the ground that the plaintiff's solicitor was only employed for that particular case. The Taxing Master has referred to the cases of *Attorney-General v. Shillibeer* (6), *Galloway v. Corporation of London* (7) and *Henderson v. Merthyr Tydfil Urban Council* (8), but in all those cases the arrangement with the salaried solicitor was that he should get a fixed salary and nothing more, so that the costs awarded to the party employing a sala-

ried solicitor went into the pockets of that party in reduction of the salary paid to the solicitor. By 18 & 19 Vic., c. 90 it is expressly provided that costs awarded to the Crown are to be paid into the consolidated fund, and it is possible, though extremely improbable, that in any one year the Crown or any Corporation or individual employing a salaried solicitor might receive, as the result of successful litigation, profit costs exceeding that salary. But as remarked by Channell, J., in *Henderson v. Merthyr Tydfil Urban Council* (8) it would be impossible in ordinary cases for a losing party to show that an actual profit was being made. In *Attorney-General v. Shillibeer* (6) Baron Parke remarked:

"It is perfectly clear that the Crown incurred expenses about this suit; and unless the Crown is to be compensated by the payment of the ordinary fees, there would be no mode of compensating it at all, because it is impossible for the Crown to say what proportion the expense of conducting this particular suit must bear to the entire salary for the year until the end of the year, when all the suits are known, and when the expense of each would be calculated, which at the time the costs are taxed it is impossible to know, and therefore it is impossible, if the Crown is to be compensated at all, that it should be compensated except in the way of payment of the ordinary fees."

The decision in *Gundry v. Sainsbury* (5) was foreshadowed by Page Wood, V. C., in *Galloway v. Corporation of London* (7) where he says:

"The argument which struck me most was that with regard to the indemnity; but I cannot apprehend that the Court can investigate agreements of this nature with respect to such a question. Mr. Bagshawe cited a case [*Hockley v. Bantock* (9)] which tended to support his view, with reference to the principle of indemnity, where a person is ordered to pay costs; and, for ought I know, if an agreement has been entered into by a client with a solicitor that he shall pay no costs, it may be a question whether or not the opposite party can avail himself of that agreement, and say to the client: You do not require indemnity."

This case differs from all the English cases cited in that it is admitted that the costs, if allowed, will not go to Government to compensate them in part for the expenses they incur annually in employing a salaried solicitor, but will go to the solicitor himself in excess of his salary. It is suggested that if this arrangement did not exist and the solicitor had not the chance of recovering profit costs in suits by or against

6. (1849) 19 L J Ex 115=6 D & L 236.

7. (1867) 4 Eq 90=36 L J Ch 978.

8. (1900) 1 Q B 434=69 L J Q B 335.

9. (1833) 2 My. & K 437=3 L J Ch (n. s.) 93.

Government in which costs might be awarded to Government, he would have to be paid a higher salary and that, therefore as such costs are allowed by Government to be paid to their solicitor, they are really compensation for such excess salary as they otherwise would have to pay. I doubt whether this is a satisfactory argument apart from the fact, that there is no evidence to show that if the above mentioned arrangement did not exist Government would pay their solicitor a higher salary.

But as stated by Baron Parke in *Attorney General v. Shillibeer* (6) the Government have incurred expenses, although no particular portion of the salary of their solicitor can be allocated to the work done in this suit, and therefore they are entitled to be compensated by receiving costs from the losing party. If they choose, instead of setting off their costs against the salary they have to pay, to hand them over to their solicitor as a bonus, can the plaintiffs object? I think they could only object if the solicitor depended entirely on his remuneration for costs recovered from opposite parties. If, for instance, a party agrees with his solicitor to pay him a fixed sum, say £100, for the costs of a suit and pays him that amount, then, if he wins, whatever his costs, when taxed, may amount to, he is not entitled to recover more than £200 from the losing party. But the latter can have no voice in the spending of that money by his opponent even although there may be an agreement to pay the solicitor the balance of his taxed costs.

The question of the fees of the Advocate-General stands on the same footing, but there is further a decision in *Lord Advocate v. Stewart* (10), cited with approval by Lord Halsbury (in *Laws of England*), Vol. 26, p. 804, that a losing party must pay the fees of counsel for the Crown even though he be paid a fixed salary. In my opinion therefore the decision of the Taxing Master was right and the application for a review must be dismissed.

G.P./R.K. *Application dismissed.*

10. (1899) 63 J P 473.

A. I. R. 1916 Bombay 260

BATCHELOR AND SHAH, JJ.

Aba Waku Gondhali—Accused — Applicant.

v.

Emperor—Prosecutor—Opposite Party.

Criminal Revn. Appln. No. 376 of 1915, Decided on 21st February 1916, for revision from conviction and sentence by First Class Magistrate, Bhimthadi.

Bombay District Police Act (1890), S. 39-A and R. 33—License is not required by person who does not take actual part in performance.

The accused paid a certain sum of money to a party of strolling actors in consideration of a performance to be given by them, the accused having the privilege of selling all the tickets and making such profit as he could out of the transaction. He obtained no license from the police, and was prosecuted and convicted for a breach of the rules framed under S. 39-A:

Held: that in R. 33 the words "assisting in" refer only to persons taking an actual part in the acting or performing which is prohibited and hence, as the accused had taken no such part in the performance, the conviction must be set aside. [P 261 C 1]

D. C. Virkar—for Applicant.

S. S. Patkar—for the Crown.

Batchelor, J.—The applicant has been convicted under S. 65, Bombay District Police Act 4 of 1890 and the offence imputed to him was a breach of rule No. 35 framed under S. 39-A of the Act of 1890. That rule provides in substance that subject to the provisions of R. 33 no person shall without a license hold any public performance of a stage play. What the accused is found to have done is this. He paid a sum of Rs. 10 to certain strolling actors in consideration of performance to be given by them, the accused having the privilege of selling all the tickets and making such profit as he could out of the transaction. It is not alleged that the accused took any personal part in the performance itself. The question is, whether his acts fall under the prohibition of S. 65. The learned First Class Magistrate held in the affirmative, because he says that the penultimate clause of R. 33 clearly shows that persons assisting in the performance are equally responsible, that is, equally with those who give the performance.

This interpretation however is, we think, a misreading of the words of Rule 33, which are these "any persons holding or assisting in a performance so

prohibited shall be punishable." As we read the words "assisting in," they refer only to persons taking an actual part in the acting or performing which is prohibited. That being so and there being nothing to show that this petitioner took such part in this performance, the Rule must be made absolute, the conviction and sentence being set aside and the fine, if paid by the applicant, being refunded to him.

G.P./R.K. *Rule made absolute.*

A. I. R. 1916 Bombay 261

BATCHELOR AND HAYWARD, JJ.

Harkisondas Shivlal and others — Plaintiffs—Appellants.

v.

Chhaganlal Narsidas and others—Defendants—Respondents.

Second Appeal No. 544 of 1913, Decided on 18th August 1915, from decision of Ag. Dist. Judge, Broach, in Cross Appeals Nos. 97 and 98 of 1910.

Civil P. C. (1908), O. 1, R. 8 and O. 6, R. 17—Community divided into two sections *M* and *S*—Meeting of members of *M* section attended by only 60 out of 183 authorising plaintiffs to sue *S* section—After institution 112 members consenting remaining 71 supporting defendant—Suit on behalf of members not consenting is incompetent—Authority being lacking at time of suit—It must fail — Subsequent consent is of no avail—Permission to amend cannot be granted.

A community was divided into two sections *M* and *S*. Some members of the former section held a meeting and authorized the plaintiffs by a resolution to sue, on behalf of the whole section, the headman of section *S* for settlement of accounts and for payment of the amount that might be found due upon those accounts being taken. The meeting was irregular, being attended out of a total of 183 by only about 60 members of the section, some of whom were not entitled to vote. However after the institution of the suit 112 members consented to the plaintiffs' action. The remaining 71 members supported the defendant:

Held: (1) that the plaintiffs could not, under O. 1, R. 8, sue on behalf of those members of the *M* section who were admittedly in diametrical opposition to the plaintiffs in the controversy; (2) that the rules of equity and good conscience forbade the inference that the consent obtained after the institution of the suit was on the same level as the open casting of votes at the public meeting; (3) that as the authority was lacking when the suit was in fact filed, it must fail; (4) that permission to amend the plaint ought not to be granted, inasmuch as it would expose the defendant to an injury which could not be compensated in costs, would alter the whole fabric and character of the suit, and the amended claims would be sprung upon the defendant for the first time; claims which he never

had any opportunity either of considering or resisting before. [P.262 C 2]

B. J. Desai and T. R. Desai—for Appellants.

H. C. Coyajee and D. A. Khare—for Respondents.

Batchelor, J.—The plaintiffs, who are the appellants before us, are like the defendants members of a caste known as the Dasa Lad Baniyas of Broach, and the case is divided into two sections known as the Mojumpurias (Mojumpur being a hamlet of Broach in which certain members of the caste lived or used to live), and the Sheherias or the City section. The plaintiffs belonged to the Mojumpur section, while the principal defendants belonged to the Sheheria section. The plaintiffs in their plaint set out that they were authorized by the Mojumpur section on 18th April 1909 to bring this suit, which they accordingly did bring under O. 1, R. 8, Civil P. C., as representing the members of the Mojumpur section. The object of the suit was to depose 1st defendant from the position which he appears to occupy both in the Mojumpur and in the Sheheria sections of the caste and the principal prayers made in the plaint were that the accounts of the Mojumpur section should be settled from Sambat 1953 and that defendant, should be compelled to pay to the plaintiffs the amount that might be found due upon those accounts being taken.

The trial Court made a decree in favour of the plaintiffs, but upon appeal that decree was amended by the learned District Judge who refused the prayer that defendant 1 should be called upon to refund the moneys due to the Mojumpur section, though he allowed the plaintiffs' claim to the extent that accounts should be taken from defendant 1. From that decree the plaintiffs bring this present appeal, while the respondents have filed cross objections in respect to that portion of the decree which was in the plaintiffs' favour. We have had a very careful argument from Mr. Desai on behalf of the plaintiffs-appellants, but I am of opinion that this suit was misconceived and must fail. As I have shown, the plaintiffs purported to be suing on behalf of the whole Mojumpur section, or sub-caste, by virtue of O. 1, R. 8. But it seems to me clear upon the very face of things that the plaintiffs could not, under O. 1,

R. 8, sue on behalf of those numerous members of the Mujumpur section who admittedly were and are in diametrical opposition to them in this present controversy. In no sense could these persons be said, I think, to be represented by the plaintiffs in this suit. For in no sense could it be said, as the language of the rule requires, that they and the plaintiffs held the same interest in the suit and that the plaintiffs in bringing this suit were suing for or on behalf of these dissentient members. But then it was said that in any event the suit was good, considered as brought by the plaintiffs for themselves and for those members of the Mojumpur section who at the meeting of 18th April 1909 recorded their opinions in favour of the plaintiffs' views. There however the difficulty is the learned appellate Judge's finding of fact that this meeting was irregularly convened, and Mr. Desai has very properly and candidly admitted that that finding of fact is binding upon him in second appeal.

The result therefore is that the constitution of this suit cannot be justified by reason of anything that took place at the meeting of 18th April 1909. That difficulty was, as I understand, admitted by Mr. Desai who however sought to remove it by reference to events that occurred after the filing of the suit; and the contention was that, although at the date of the filing of the suit, the plaintiffs were without that authority upon which they purported to base their suit, yet such authority was subsequently supplied to them by the circumstance that after the filing of the suit numerous members of the Majumpur section communicated to the plaintiffs their adherence to the position which the plaintiffs were adopting. Thus by the application Ex. 73, 42 such members expressed their adherence. By the letters and post cards, Exs. 74 to 87, 14 other members gave a like expression of opinion. The total according to Mr. Desai's calculation, would give 112 members consenting to the plaintiffs' action out of a total membership of 183. Now it was admitted in the course of the argument that in this matter there is neither statutory law nor custom which can guide us to a decision, and that in consequence under the Regulation of 1827

our determination must be founded upon equity and good conscience.

But it seems to me that the rules of equity and good conscience forbid the inference that an expression of opinion obtained in private after a suit filed is on the same level as the open casting of a man's vote at a public meeting. For, at the public meeting there are his friends to support him and there are his adversaries to correct him or any other member on his side if any misrepresentation or exaggeration should be used in argument; whereas opinions obtained by one party in private behind the back of the other party may be obtained by inducements or representations which, if they were known to the Court, would not be approved by the Court. I think therefore that it is not possible to call in aid these private expressions of consent obtained after suit filed, so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed. That being so, the suit as constituted must, I think, fail.

We have carefully considered whether under O. 6, R. 17, we ought not to allow, even at this late stage of the litigation, the plaintiffs to amend their plaint. I am of opinion that permission ought not to be granted for the reason that if it were granted, it would expose the defendants to an injury which could not be compensated in costs. For the amendment of the plaint in the manner suggested would alter the whole fabric and character of the suit, and however the amended claims might be worded, the result would be that they would be claims now sprung upon the defendants for the first time, claims which the defendants up till now have never had any opportunity either of considering or of resisting. In my opinion therefore the whole suit fails and should be dismissed with costs throughout.

Hayward, J.—I entirely concur.

G.P./R.K.

Suit dismissed.

A. I. R. 1916 Bombay 262

SCOTT, C. J. AND SHAH, J.

Laxman Nilkant Pusalkar—Appellant.

v.

Vinayak Keshav Pusalkar—Respdt.

Second Appeal No. 446 of 1914. Decided on 18th October 1915.

Hindu Law — Joint family — Money borrowed by one coparcener for benefit of all — Decree obtained against borrower alone — Interest of other coparceners is not liable to attachment and sale in execution of decree.

One of the several coparceners borrowed money for the benefit of all the coparceners on a bond signed by him alone. To the suit on the bond his coparceners were not made parties and a decree was obtained against him alone :

Held : that the interest in the family property of any coparcener other than the judgment-debtor could not be attached and sold in execution of the decree. [P 263 C 2]

Quære.—Whether 14 *Bom* 597 and 23 *Bom* 372, lay down the law correctly? : 6 *Bom* 564 ; 7 *Bom* 95 (note) ; 11 *Bom* 700 ; 32 *Cal* 296 (P C) ; 15 *Cal* 70 (P C) and 18 *I C* 385, *Ref*.

[P 263 C 1]

G. K. Parekh—for Appellant.

B. V. Desai—for Respondent.

Scott, C. J.—This suit is brought by the plaintiff to establish his right to attach and sell the interest of the defendant (amounting to one-fourth of an equity of redemption) in execution of a Small Cause Court decree passed on an instrument of loan signed by the judgment-debtor alone, who was a brother and co-parcener of the present defendant. The money is held to have been borrowed for the benefit of all the brothers. The present defendant was not a party to the suit in the Small Cause Court. The question now to be decided is unembarrassed by the interest of any innocent Court-sale purchaser. It is simply whether the unincumbered interest of a Hindu can be attached and sold in execution to satisfy a money-decree obtained against his brother in a suit to which the objector was no party. It may be conceded that on the findings of the lower Court the present defendant was a principal disclosed or undisclosed of the borrower and the latter as an agent would have an agent's rights of indemnity, but that is not sufficient for the plaintiff. He desires to obtain satisfaction direct from his debtor's brother's property. A similar question was stated but not decided by the Judicial Committee in *Durgapersad v. Keshopersad Singh* (1). In Bombay cases where the question has arisen the current of decisions has not been uniform. Until *Hari Vithal v. Jairam Vithal* (2) it was uniformly held in this Court that a sale under a decree against the manager of a Hindu family when that manager was

not the father of the other cosharers, only passed the right, title and interest of the party to the suit : see *Maruti Narayan v. Lilachand* (3), *Pandurang Kamti v. Venkatesh Pai* (4) and *Lakshman Venkatesh v. Kashinath* (5). In *Hari Vithal v. Jairam Vithal* (2) however it was stated that :

" Though in the Bombay Presidency the course of decisions as regards sales under a decree against a manager has been as stated in the case of *Lakshman Venkatesh v. Kashinath* (5), still the right of a manager to bind the estate by transactions for its benefit is well established That being so, the decision of the Judicial Committee in *Daulat Ram's* case (3) must now be held to govern cases such as the present, where family property has been sold in execution of a decree against a manager alone. It practically overrules the decision in *Lakshman Venkatesh v. Kashinath* (5) and the preceding decisions there referred to."

Daulat Ram v. Mehr Chand (6) related solely to mortgaged property and it does not appear to me to affect in any way the authority of *Lakshman Venkatesh v. Kashinath* (5) and kindred cases. In a later case however *Sakharam v. Devji* (7), the view taken in *Hari Vithal v. Jairam Vithal* (2) was adopted and reinforced by a reference to *Sheo Pershad Singh v. Saheb Lal* (8), again a case of mortgage or, as it is called in the report 'pledge.' *Hari Vithal v. Jairam Vithal* (2) and *Sakharam v. Devji* (7) have not been accepted without demur : see *Madhusudan Shivaram Kanvinde v. Bhau Atmaram Lad* (9). In *Khiarajmal v. Daim* (10) the Judicial Committee observed that the Court has no jurisdiction to sell the property of persons not parties to the proceedings or property represented on the record, although judicial sales are not disturbed on the ground that some members of the family who were minors were not parties, if it appears that there was a debt justly due from a deceased member of the family and no prejudice is shown to the absent minors. This must now be taken subject to S. 53, Civil P. C. In the present case the stage of sale has not been reached and there is no reason for assuming jurisdiction to dispose of property belonging to one who was no party

3. (1881-82) 6 *Bom* 564.

4. (1883) 7 *Bom* 95 (note).

5. (1887) 11 *Bom* 700.

6. (1888) 15 *Cal* 750=14 *I A* 187 (P C).

7. (1899) 23 *Bom* 372.

8. (1893) 20 *Cal* 453.

9. (1913) 18 *I C* 385.

10. (1905) 32 *Cal* 296=32 *I A* 23 (P C).

1. (1892) 8 *Cal* 656=9 *I A* 27 (P C).

2. (1890) 14 *Bom* 597.

to the suit and is not a representative of the judgment-debtor. I would reverse the decree and dismiss the suit with costs throughout.

Shah, J.—I concur. I desire to add that I express no opinion as to the correctness of the view taken in *Hari Vithal v. Jairam Vithal* (2) that *Daulat Ram's* case (6) has the effect of overruling the earlier decisions of this Court in *Maruti Narayan v. Lilachand* (3) and *Lakshman Venkatesh v. Kashinath* (5). The point does not arise in this case, and when it arises it will require to be carefully considered in view of the doubt expressed in *Madhusudan Shivaram Kanvinde v. Bhau Atmaram Lad* (9).

G.P./R.K.

Appeal accepted.

A. I. R. 1916 Bombay 264

BATCHELOR, AG. C. J. AND SHAH, J.

Vinayakrao Basasaheb Inamdar and another—Plaintiffs—Appellants.

v.

Shamrao Vithal Kalkundri and another—Defendants—Respondents.

First Appeal No. 192 of 1913, Decided on 17th August 1916, from decree of First Class Sub-Judge, Belgaum, in C. S. No. 445 of 1911.

Dekkhan Agriculturists Relief Act (17 of 1898), S. 3 (3) — S. 3 (3), Contemplates suit for redemption either simpliciter or primarily and substantially — Suit in reality to set aside in consent decree and sale-deed — Suit is outside purview of the Act.

The words of S. 3 (3), Dekkhan Agriculturists' Relief Act, contemplate a suit for redemption of a mortgage either simpliciter or primarily and substantially. [P 264 C 2]

Where however under the cloak of a redemption suit, the plaintiff seeks to set aside a consent decree and a sale-deed and when those things are done, to recover the property of which he has been fraudulently deprived, the suit is outside the Act: 9 I C 393, Ref. [P 265 C 1]

Jayakar and S. S. Patkar—for Appellants.

H. C. Coyajee and G. S. Mulgaonkar and T. R. Desai—for Respondent 1.

Nilkanth Atmaram — for Respondent 2.

Batchelor, Ag. C. J. — The appellants, who were the plaintiffs in the lower Court, brought this suit as a suit for redemption under the Dekkhan Agriculturists' Relief Act. The mortgage to be redeemed was said to be that executed by the plaintiffs' father in 1884. In 1899, the mortgagee sued the mortgagor for recovery of the mortgage-debt and for sale of the property. In March 1900,

there was a consent decree by which a new sum was taken as the capitalized principal, interest was allowed at seven and half per cent. and provision was made for payment of the money by certain instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage, and notably Survey No. 50, which was included in the order mortgage, was excluded from the purview of the consent decree. On the same day as this consent decree was obtained, Survey No. 50 was sold by the mortgagor to the mortgagee for Rs. 1,000. In 1903, the mortgagee, on his application for execution of the consent-decree, obtained possession of the property and has since remained in possession. Thereupon, in 1911, the plaintiffs brought the present suit. In their plaint they set out the facts which I have summarised, and they claim to set aside the consent decree as having been obtained by fraud, coercion and misrepresentation. In the same way they seek to set aside the sale-deed of Survey No. 50 on the ground that it was nominal and fraudulent and procured by coercion.

Mr. Coyajee contends, and I think rightly, that such a suit is outside the Dekkhan Agriculturists' Relief Act. If reference be made to Ss. 3, 2 and 13 of that Act, it will be seen that the suit can only be brought within the Statute if it is a suit for the redemption of mortgaged property within the meaning of Cl. 3, S. 3. It is, in my opinion, clearly not within this clause, the words of which contemplate a mortgage suit either simpliciter or primarily and substantially. This however is something far more than that, and very different from that. It is a suit to set aside a sale deed and a Court's decree, and when those things are done, to recover the property of which, according to the plaint, the plaintiffs have been fraudulently deprived. This seems to me to be the description of the suit, and, if that is so, it falls, I think, within the authority of the Privy Council decision in *Mt. Bachi v. Bickchand Jiomol* (1), where Lord Macnaghten said, in language which appears to me perfectly applicable to the present suit:

"In form it is a suit for redemption. In reality it is nothing of the kind. It is a suit to

1. (1911) 9 I C 393 (PC).

recover property of which the rightful owner has been deprived by fraud. That settles the case."

In the case before their Lordships of the Judicial Committee the obstacles which stood in the way of the immediate redemption were certain private sales made by the mortgagors to the mortgagees. Here also the obstacle is in part the same. For in part it consists of the private sale of Survey No. 50 made by the mortgagor to the mortgagee in 1900. For the rest the impediment consists of the decree of a Court, which is not the less a decree because it was obtained by consent of parties. I may add that on similar facts this Court took the view which I am now expressing in *Shamrao Vithal Kalkundri v. Nilkanth Ramchandra Kulkarni* (2). On these grounds it appears to me that the suit as brought is not maintainable. That being so, we express no opinion as to the merits of the case on any other point of controversy between the parties. The appeal must be dismissed with costs, the lower Court's decree being affirmed. Respondent 1 alone will have the costs.

Shah, J.—I agree.

G.P./R.K. *Appeal dismissed.*

2. F A No 15 of 1912 (unreported).

A. I. R. 1916 Bombay 265

MACLEOD, J.

C. Boggiano & Co.—Plaintiffs.

v

Arab Steamers Ltd.—Defendants.

Original Civil Suit No. 966 of 1915,
Decided on 21st October 1915.

(a) **Contract Act (1872), S. 65**—Payment of freight in advance to Steamer Company—Voyage abandoned by reason of Government prohibitory orders—Suit to recover freight is governed by S. 65.

The plaintiffs put under a charter-party, on board s.s. "Jeddah" belonging to the defendant Steamer Company, 2500 bales of cotton for Genoa, and paid Rs. 32,610 for freight. Owing however to the import of cotton into Genoa being prohibited by orders of Government, the "Jeddah" did not leave the harbour and the voyage had to be abandoned, and eventually it unloaded her cargo. Before getting delivery of the cotton, the plaintiffs were asked to deposit Rs. 12,000 to cover the expenses and loss incurred by the ship and this sum was paid. The plaintiffs filed a suit to recover the freight and for an account of Rs. 12,000 paid by them to defray the costs of unloading:

Held: (1) that the case was governed by S. 65 and the plaintiffs were entitled under the circumstances to recover with interest the amount paid by them for freight. [P 263 C 2]

(2) That on the question of account the de-

fendants were entitled to charge reasonable expenses for unloading, etc. [P 268 C 2]

(b) **Carriers Act (1865)—Benefit of Act.**

Carriers by sea in India are not entitled to the benefits of Act. [P 267 C 1]

Strangman and Desai—for Plaintiffs.

Campbell and Weldon—for Defendants.

Judgment.—The defendant Steamer Company entered into an agreement, on the 1st April 1915, with the firm of Chhagandas and Company whereby the latter chartered the steamer "Hejaz" for a voyage, Bombay to Naples, Genoa and/or Marseilles, any two discharging ports at charterer's option. On 14th April, the "Jeddah" was substituted for the "Hejaz." The plaintiffs procured from Chhagandas and Company freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants. The 2,500 bales were put on board the "Jeddah" and 25 bills of lading relating to them were issued by the defendants, who were paid Rs. 32,610-6-2 for freight. Owing however to the import of cotton into Genoa being prohibited by orders of Government, the "Jeddah" did not leave the harbour and the voyage had to be abandoned. Negotiations were entered into with the various shippers of cotton, which are set out in the correspondence annexed to the pleadings, but eventually the Jeddah unloaded per cargo in the Alexandra Dock. Before getting delivery of their cotton the plaintiffs were asked to deposit Rs. 12,000 to cover the expenses and loss incurred by the ship and this sum was paid. The plaintiffs thereupon demanded the return of the amount paid by them for freight, but the defendants claimed that under the events which had happened they were entitled to retain the money and especially relied upon the second slip attached to the shipping orders. The plaintiffs therefore filed this suit to recover the freight and for an account of the Rs. 12,000 paid by them to defray the costs of unloading. If the Contract Act applies, the contract became void under S. 56 of the Act and the defendants were bound, under S. 65, to restore to the plaintiffs the advantage they had received under the contract.

But it has been contended, first, that money paid in advance for freight is irrecoverable at law, secondly, that the defendants are common carriers and

that under the decision of the Privy Council in the case of *Irrawaddy Flotilla Co. v. Bugwandas* (1) the rights and liabilities of common carriers are outside the Contract Act and governed by the principles of English Law as modified by the Common Carriers Act of 1865. By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter-party to covenant by express stipulation in such manner as to control the general operations of law: per Lord Ellenborough, C. J., in *De Silvale v. Kendall* (2).

Now the defendants, for their first proposition, relied on the case of *Kirchner v. Venus* (3), where it was held that freight paid in advance lost its legal character of freight and was money paid to the ship-owners for taking the goods on board and undertaking to carry them to their destination, while freight in law was money paid for the carriage of the goods and was payable on the arrival of the goods at their destination though it might, under the terms of the contract, be payable at the port of departure. But the question in that case was whether the shipowner had a lien for freight on goods shipped from Liverpool to Sydney when, under the terms of the charter, the freight was to be paid in Liverpool one month after the date of sailing and, as a matter of fact, had not been so paid before the ship arrived at Sydney, and it was decided that as the money so to be paid was not freight in law, the shipowner had no lien on the goods. I doubt whether in these days such a contract for the carriage of goods would be likely to be made in India; either the freight is paid before the goods are shipped in which case the shipper would insure the freight, or the freight is payable on arrival in which case the shipowners would insure; though if it is a term of the contract that freight is payable, ship lost or not lost, the shipper would have to insure in any case.

But freight to be paid in advance is not irrecoverable because it loses its

1. (1891) 18 Cal 620 = 18 I A 121 = 6 Sar 40 (P C).

2. (1815) 4 M & S 37 = 16 R R 373.

3. (1859) 12 M P C 361 = 7 W R 455.

legal character of freight, but because by the Common law of England the general rule is that when a contract becomes impossible of performance by the failure of a state of things contemplated as the foundation of the contract to exist, the partners are excused from further performance and acquire no rights of action so that each must bear any loss or expense already incurred, and cannot recover back any payment in advance: *Civil Service Co-operative Society v. General Steam Navigation Company* (4). Reading the charter-party, the shipping orders and the bills of lading together, I think that the money paid by the plaintiffs was freight paid in advance under the terms of the contract and was not merely money payable in Bombay on the completion of the voyage, which was paid prematurely at the will of the plaintiffs, as was the money paid for freight in the case of *Krall v. Burnett* (5). It is admitted that under the Common law of England the plaintiffs would not be able to recover because the contract became impossible of performance and it is argued that the Common law of England applies because the defendants are common carriers. The following definition of a common carrier by Parsons was approved by Cockburn, C. J., in the case of *Nugent v. Smith* (6):

"A common carrier is one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage."

A common carrier is also entitled, when goods are offered to him, to demand and to be paid the full price of carriage, and if this is not paid he may lawfully refuse to carry at all. But the price demanded must be a reasonable one. It is also essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him. Now the preamble to Act 3 of 1865 states:

"Whereas it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the

4. (1903) 2 K B 756 = 72 L J K B 933.

5. (1876) 25 W R 305.

6. (1876) 1 C P D 423 = 45 L J P C 697.

negligence or criminal acts of themselves, their servants or agents"

and under S. 2:

"'Common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately"

thus excluding carriers by sea. Therefore carriers by sea in India are not entitled to the benefits of Act 3 of 1865, though it may be a question whether the Common law of England is not still applicable to them. In the case of *British India Steam Navigation Co. Ltd. v. Hajee Mahomed Esack & Co.* (7) the Court seems to have assumed it without further consideration, but considering the terms of the preamble I should feel inclined to doubt it. The law relating to the liability of common carriers was first established by our Courts with reference to carriers by land. In the case of *Rich v. Kneeland* (8) it was decided that the common wayman or carrier by water stood on the same footing as common carrier by land. The first case in which the liability of the owner of a seagoing ship comes in question was *Morse v. Slue* (9): see per Cockburn, C. J., in the case of *Nugent v. Smith* (6). Now it is interesting to note that in that case it was argued in the lower Court, though without success, that the liability of the defendant Company, which agreed to carry the plaintiff's mare by steamer from London to Aberdeen, could not be made to rest on the allegation that they were common carriers, because it was said that liability was imposed by the custom of the realm and such a custom could not have force beyond the realm.

It may be that the owners of coasting steamers should be considered on the same footing as carriers by inland navigation, but it would be difficult for any owners of seagoing steamers to come within the definition of "common carriers" though of course it is not impossible, and as the Indian Legislature designedly excluded common carriers by sea from the benefits of Act 3 of 1865, they may have intended to bring their liability under the Common law of bailment. But even supposing the defendants' Company run general ships as common carriers, the next question is

whether in this particular case when they chartered the whole ship to Chhagandas & Co., they can be treated as common carriers. The whole question was very fully discussed in the case of *Nugent v. Smith* (6), above cited, by Cockburn, C. J., (though it was not necessary for the decision of the case) in order to meet the opinion expressed by Brett, J., in the lower Court that by the Law of England all carriers by sea were subject to the liability which by that law undoubtedly attached to common carriers whether by sea or land:

"All Jurists who treat of this form of bailment carefully distinguish between the common carrier and the private ship But if the owner of a ship employs it on his account generally . . . he will not be deemed a common carrier, but a mere private carrier (Story on Bailment, S. 501) But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship I cannot help seeing the difficulty which stands in the way of the ruling in the case of *Liver Alkali Co. v. Johnson* (10), that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and as it seems to me could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it The importance of the question is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charter-party or bill of lading."

Therefore it is not sufficient to say that because the defendants' Company own steamers and carry goods by sea they are common carriers. For all I know they may own general ships though there is no evidence that they run any ships on a particular line between certain termini on which they are bound to carry goods for the public on receipt of reasonable charges. Even if they did that would not make them common carriers as regards ships let out on charter. In this case the whole ship had been chartered by Chhagandas & Co., who brought the persons to whom they sold cargo space into contractual relationship with the defendants. Therefore the ship was not a general ship the owners of which were bound to carry goods for any of the public who might wish to despatch their goods in the ships.

7. (1881) 3 Mad 107.

8. (1614) 2 Cro Jac 230=Hob 17=79 E R 282.

9. (1872) 1 Vent 190=3 Keb 72.

10. (1874) L R 9 Ex 333=43 L J Ex 216.

The last question is whether, even supposing the defendants are common carriers, the provisions of the contract applicable to all contracts in general are not applicable to the contract in this case. In the case of *Irrawaddy Flotilla Company v. Bugwandas* (1) the only question was whether the chapter of the Act relating to bailments applied. Their Lordships were only dealing with the liability of common carriers, and the Common law of England relating to common carriers only differs from the Common law of contract in respect of their liability as bailees. They held that as Act 3 of 1865, which codified only a part of the Common law relating to the liability of common carriers, was not repealed by the Contract Act, it was intended to leave the law in India relating to the liability of common carriers as it was, that is to say, partly governed by the Common law and partly by Act 3 of 1865 and not to substitute for that part of the Common Law which was not included in Act 3 of 1865 the provisions of the Act.

I do not think that, when their Lordships said that there was in India before the Contract Act a complete code for common carriers, they intended to decide that the general provisions of the Common Law relating to the formation and performance of contracts should still be applicable to contracts entered into by the public with common carriers. The defendants appear to have conceded this before the hearing, as it is nowhere suggested in the correspondence before suit or in the pleadings that the defendants were common carriers. The plaintiffs were asked to admit that the ship was under charter to Chhagandas & Co. and in para. 5 of the written statement the defendants rely on S. 56, Contract Act. The defence was really based on the decision in the case of *Civil Service Co-operative Society v. General Steam Navigation Co.* (4), which is applicable to all contracts and not only to contracts with common carriers. The special provisions of the Common Law of common carriers dealt with their liability and nothing else, and formed a special chapter of the law of bailment. Therefore, in any event, in my opinion, the case is governed by S. 65, Contract Act; and

the plaintiffs are entitled, under the events which have happened, to recover the amount paid by them in advance for freight with interest at six per cent. from 15th June 1915. As regards the account rendered for expenses, the defendants have conceded that demurrage should only be charged for twenty-five days and the item for demurrage on waggon should be omitted.

The plaintiffs contest the item for insurance, on the ground that they were not informed that the defendants were going to insure the goods and if they had been, they would have asked the defendants not to insure as their goods were covered by a general policy. It is interesting to contrast the defendants' anxiety to insure the goods with their present contention that they were common carriers. However I must accept Mr. Wardlaw Milne's evidence that at a meeting with the shippers on 20th May the question of insuring the goods was discussed, so that plaintiffs must have had notice and could have told the defendants if they wished them not to insure their goods. The charges for labour for removing the goods to Tank Bunder must stand, as the plaintiffs have not proved that the defendants could have obtained cheaper rates for the work to be done considering all the circumstances of the case and especially the time of year. As the defendants have paid into Court more than sufficient to meet the balance for expenses that can be set-off against the freight which is re-payable, there will be a decree for plaintiffs for the amount of the freight paid with interest at six per cent. from 15th June 1915 till judgment with costs and interest on judgment at six per cent.

G.P./R.K.

Suit decreed.

A. I. R. 1916 Bombay 268

BEAMAN, J.

Mukanchand Rajaram Balia—Plaintiff.

v.

Nihalchand Gurmukhrai—Defendant.

Original Civil Suit No. 1251 of 1914,
Decided on 2nd July 1915.

(a) Contract Act (1872), S. 47—Contract governed by rules of Bombay Cotton Trade Association — Vendor not giving delivery before specified time cannot sue for dam-

ages on contract—Bombay Cotton Trade Association Rules—Rr. 15 and 17.

Under a contract governed by the rules of the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 p. m. of due date. Where the vendor has not tendered the goods before the specified time, he fails, under S. 47, Contract Act, to perform his part of the contract and thus precludes himself from approaching the Court as a plaintiff in a suit for damages on the contract. [P 272 C 1]

(b) Bombay Cotton Trade Association Rules, Rr. 15 and 17 — Practice of giving railway receipts is not intended to absolve vendor from obligation in Rr. 15 and 17.

The practice of giving railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent. of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in Rr. 15 and 17. [P 271 C 2]

(c) Bombay Cotton Trade Association Rules, R. 17 — "Tender" — Meaning explained.

The framers of the R. 17 meant the word "tender" to have its full legal connotation.

[P 272 C 1]

Wadia and Mehta—for Plaintiff.

Setalvad and Desai—for Defendant.

Judgment. — This case has been brought, as counsel stated, by way of a test case. The point upon which I understood at first that it was meant to be a test case was, whether the contract between the parties was to be read as containing a clause precluding either of them from cancelling the contract in any event, and, if so, whether that was a good agreement. As the case developed it appeared as though the decision of the Court were required upon another point, namely, whether the plaintiff by giving the railway receipt on 19th March 1914 had thereby complied with the condition of the contract made between the parties requiring tender by the vendor. The contract is a cotton contract entered into on 25th January 1914 for the purchase by the defendant from the plaintiff of 200 bales of cotton—March delivery—between 15th and 25th, and expressed to be in all details governed by the Rules of the Bombay Cotton Trade Association, subject only to this exception: that in no circumstances was the contract to be cancelled. I have no doubt whatever, notwithstanding the fact that for want of punctuation a different construction has been sought to be placed by the defendant upon the term, that the contract meant and was expressed to be irrevocable. A very cursory study of the Rules

of the Bombay Cotton Trade Association will show why a term of this sort is introduced into almost all cotton contracts between reputable dealers. If we turn to R. 17 of the rules of the Bombay Cotton Trade Association, we shall find that under a contract of this kind the vendor is bound to tender a delivery order backed by the goods before 1 p. m. of due date.

That will be on this occasion before 1 p. m., of 25th March 1914. In the event of his failure to do so, the buyer has three courses open to him: (1) to cancel the contract; (2) to buy at seller's risk, and (3) to close at the room-rate of the day. The first of these three courses, if left open, would practically put a stop to all cotton business in Bombay. That is the reason why all these contracts will be found, I believe, certainly the English contracts, to have a clause similar to the clause in this contract stipulating that in no circumstances is the contract to be cancelled. What, then, is the result if the seller does not tender a delivery order for the goods in due course? The buyer may buy at seller's risk paying the difference if the market has fallen, or he may choose simply to close the contract without taking the goods by paying differences. If the seller refuses or negligently omits to tender, it is obvious that in a falling market the buyer stands in no need of any remedy whatever. The provisions of R. 17, which have the appearance of being optional, must therefore be understood, if business is to go on at all, as being imperative upon the other party to the contract. Very unfortunately, expert evidence which might have been available to the Court on the custom of the trade, particularly with reference to the substitution of railway receipts for delivery orders, was objected to by the defendant; and consequently I have not that material on the record which would enable me to give chapter and verse upon the highest authority for the proposition I am now stating as being a proposition generally true, applicable to and governing the cotton trade in this city.

There can, I apprehend, be absolutely no doubt that between large firms thousands of deals are entered into under the Rules of the Bombay Cotton Trade Association, every contract including a

term that the contract shall not be cancelled in any circumstances ; and that the parties thereto settle under R. 17 in the manner I have described ; that is to say, it would be the understanding between honest dealers that the party against whom the market had turned would, whether delivery were tendered or not, conclude the contract in the manner made optional to him by R. 17. He could not cancel the contract but he would be obliged, if he were an honest dealer, either to buy at the risk of his vendor and send him a difference note, stating the rates at which he bought and at which he had agreed to buy from the vendor, and pay the difference ; or he would adopt the simpler course or merely invoicing the goods back to the vendor at the market rate of the day, again paying the difference. It is perfectly clear that if the contracts were allowed to be cancelled merely for non-tender of goods or delivery order, as is actually provided for in R. 17, a great part of the cotton business done on a large scale by the principal firms here would be paralysed.

On the other hand, it is equally clear that the insertion of such a clause in the contracts indicates that they are essentially what the Courts would call wagering contracts and therefore there might be some difficulty in enforcing them in a Court of law. Doubtless, it is also for this reason that so little stress is laid upon the tender of the delivery order ; for the non-tender of the delivery order, for all the purposes which the framers of the Rules had in view, could make no substantial difference to the losses or gains of the parties, once they had contracted themselves out of the liberty allowed to the party not in breach to cancel the contract. So that I do not doubt that in practice very little importance is attached to the actual tender of delivery orders or of goods where the contracts have been made rather for cover than with the object of actually obtaining goods, it being then the well-understood practice of the market that the loser on such contracts will follow out the intentions of the framers of the rules, whether delivery was tendered or not, by adopting one or other of the two courses laid down in R. 17. The first course, viz., the cancellation of the contract, must, I repeat, be kept out of view altogether.

Now, in a case like the present, the defendant is "bulling" the market, and accordingly on the settling day, the fall having been very heavy, stands to lose a considerable sum to the plaintiff. The plaintiff has goods in his possession and nothing could have been easier for him than to tender a delivery order backed by goods to the buyer. And what was puzzling me throughout the earlier part of the case was how a business man could be so utterly foolish as to neglect a natural precaution of that kind, which would have protected him against all legal difficulties that have proved so insurmountable here. It was only when I came to read R. 17 much more carefully that I realized that between honest dealers the tender or non-tender of delivery really made no difference whatever. If the other party to the contract, whether delivery was tendered or not, is equally bound, as though upon a breach, to carry out the contract in one or two ways I have mentioned and is prohibited from cancelling it, it becomes at once clear that nothing really turns upon the tender. Let us suppose that the buyer in a falling market really desired to get the goods he had bought. He cannot seriously pretend that he is damnified in any way by the plaintiff not tendering. All he has to do is to buy the goods in the market where he would get them at a much lower rate than that he was to pay the plaintiff. It is obviously therefore fallacious and hypocritical on the part of the defendant here to pretend that there has been a substantial breach of the contract on the plaintiff's part. Technically no doubt there has been, and that is the plaintiff's great misfortune. As the defendant had settled honestly in respect of half of the contract, the plaintiff might very reasonably have anticipated that he was an honest man who would settle up in respect of the other half,

I cannot find that any tender was made of the 100 bales for which the defendant has paid differences, virtually invoicing them back to the plaintiff at the difference between the purchase rate and the rate of the day ; and that is of course what he ought to have done in respect of the 100 bales now in dispute, and would have done if he had been acting in the spirit as well as the

letter of the Rules of the Bombay Cotton Trade Association. For what appeared to me little short of insanity in a business man, namely, after having goods in his hands which he only had to tender in order to ensure great pecuniary gain he should not have made such a tender, becomes perfectly intelligible as soon as one realizes that non-delivery never involves the cancellation of the contract and really leaves the parties practically where they were for settlement at the rate of the day on the day fixed for the performance of the contract. That too explains the class of cases upon which a reference was made by Mr. Hart, when Chief Judge of the Small Cause Court here to Sir Charles Sargent and Farran, J.: see *Vanmali Hargovind v. Tarachand Ganeshamdas* (1). Unfortunately however this practice does not take into account the provisions of S. 47, Contract Act. And the answer given to the reference made by Mr. Hart establishes the simple proposition that any party shown to be in breach cannot approach the Court as a plaintiff in a suit for damages on the contract. That is the unfortunate position of the plaintiff here. Technically he is undoubtedly in breach inasmuch as he did not go through the form of tendering the delivery order backed by the goods to the defendant at his place of business at Kalbadevi before 1 p. m., of 25th March. Doubtless realizing the difficulty thus placed in his way, the plaintiff sought to overcome it by pleading that he had given the defendant the railway receipt for 100 bales of cotton on 19th March 1914.

He contended that giving a railway receipt was tantamount to giving possession of the goods, and that, inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under R. 17. That contention I am afraid cannot be sustained. In dealing with Bengal cotton (and the contract here is for Bengal cotton), no doubt if evidence had been called, it would have been found that there is a custom peculiar to this branch of the trade and that that cus-

tom gives more importance to railway receipts than could be given under a contract in common form such as I have to consider. In every contract intended to be governed by that custom of the trade I understand that the letters "R. T." (railway terms) ought to be inserted. If I found those terms in this contract, then it would have been open to the Court to invite the opinion of persons conversant with the trade to explain what the meaning of the terms was. But there is nothing in this contract, apart from the quality of the goods, to suggest that it differs in any respect from any other contracts made under the Rules of the Bombay Cotton Trade Association. Now doubtless a person giving a railway receipt for goods which he is bound to deliver before due date ordinarily does so with the object of making a partial realization of the price. It is in evidence here, though the evidence is not so clear as could be wished, that the party tendering the railway receipt ordinarily expects 90 per cent cash in advance.

But it would still lie on the person bound to make a tender under R. 17 to satisfy himself that the goods covered by the railway receipt had actually arrived in time. No obligation of that sort appears to be cast upon the takers of the railway receipt who thereon advance 90 per cent of the invoice value of the goods. I suppose this practice of giving railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in Rr. 15 and 17. As to that I entertain no doubt whatever; it could not, I think, be otherwise. On a first view, it may seem hard upon a vendor who has given a railway receipt for the goods which, in ordinary course, should arrive long before due date, that his vendee should hold the railway receipt and not inform him that the goods had not arrived, so that he might, in the belief that they had, neglect to tender the delivery order backed by the goods before 1 p. m. on due date. I am assuming here that the defendant did not inform the plaintiff that the goods covered by the railway receipt had not arrived. That is putting

1. (1891) Chitty and Pattell, Collection of Cases of the Bombay Small Cause Court, p. 305.

the position at the very highest in favour of the plaintiff. But even so, having regard to the practice of advancing 90 per cent on the railway receipt, I should still be of opinion that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to his contract.

This being my view of the legal relations existing between the parties, the case appears to be one in the eye of the law of extreme simplicity falling within S. 47, Contract Act. Under that section, there was a specified time before which the plaintiff agreed to tender the goods sold. When I first read R. 17 I thought perhaps that the word "tender" had been loosely used by the framers of those rules without the intention of giving it its ordinary sense or making it mean more than the wider word "give." If the word had been "give" instead of 'tender,' then, no doubt, it would have been an open question whether in the facts disclosed here it was for the defendant to ask for the goods or for the plaintiff to offer them. On a re-consideration of the rule however I can entertain no doubt but that the framers meant the word "tender" to have its full legal connotation; for if he wishes to be on the safe side, the vendor is bound to tender without any demand being made by the purchaser; and if he fails to do so, although should he be dealing with an honest buyer he is in no danger of incurring any loss, yet if he in dealing with a dishonest buyer, as in the present case, he clearly precludes himself from having any access to the Courts of law. He cannot come here and complain that he has been damnified by the breach of the contract made between him and the defendant when on his own admission it is he who has first broken the contract.

I have already explained that this is technical rather than substantial; and, according to what I believe to be the universal understanding of the market, the plaintiff, in a case like this, would have committed no fault whatever and all the dishonesty would have been on the side of the defendant. But the law, in its extreme zeal to suppress gambling

transactions and in its jealous desire to preserve public morality, always succeeds, in my opinion, in ultimately making itself the instrument of injustice and the protector of the dishonest against the honest gambler. Considering that in all mercantile operations on a large scale there must evidently be a considerable element of what the law calls wagering, we find in an instructive case of this kind how hardly the legal doctrine of wagering may often press against the innocent and shield the guilty. It cannot be doubted that but for the apprehension of those whose transactions must occasionally bring them very close to the domain of wagering and yet who are in every sense perfectly honest dealers, the rules of this Association would have been worded in a much more simple, direct and satisfactory manner. Being perfectly satisfied of the real merits of the case and that on the ground of morality all those merits are on the side of the plaintiff, I shall, in dismissing his suit, direct that each party bear his own costs.

G.P./R.K.

Suit dismissed.

A. I. R. 1916 Bombay 272

SCOTT, C. J. AND BEAMAN, J.

Sitabai Raghunath Vaidya—Plaintiff
—Appellant.

v.

Laxmibai Vyankatesh Vaidya — Defendant—Respondent.

First Appeal No. 49 of 1914, Decided on 30th November 1915, against order of First Class Sub-Judge, Poona, in Suit No. 89 of 1912.

Civil P. C. (1908), S. 16 (d)—Suit for maintenance praying for charge on land falls within S. 16 (d).

In a suit for declaration that the plaintiff was entitled to a maintenance allowance against the defendant who was residing in a Native State, it was prayed that the liability to pay the sum claimed should be made a charge on the defendant's land in British territory :

Held : that the suit fell within the purview of S. 16 (d) and hence the Court within the local limits of which the land was situate had jurisdiction to try the suit. [P 273 O 1]

J. R. Gharpure—for Appellant.

P. B. Shingne—for Respondent.

Scott, C. J.—The question is whether this suit can rightly be held to fall within the scope of S. 16 (d), Civil P. C. The learned Judge has held that it does not. The suit one by the mother of the deceased husband of defendant 1 against

that defendant and her father. Both the defendants live in a Native State, and, therefore, in respect of personal claims they will not be liable to the jurisdiction of the Court unless the suit falls within S. 16. The suit is for a declaration that the plaintiff is entitled to a maintenance allowance of a certain amount for her life against defendant 1 and for residence and pilgrimage expenses and other claims and also for stridhan property, and one of the objects of the suit, which is set out in the prayer, is that the liability to pay the sums claimed should be made a charge on defendant 1's land in the Inam village in the Bhimthadi Taluka of the Poona District, and on her share also in the said village. Defendant 1 is sued as the person to whom the family estate has come upon death of her husband, whose mother is the plaintiff Sitabai. On the plaint as framed, the question which has to be decided before the Court will be enabled to pass a decree, is whether or not the plaintiff is entitled to a right to or interest in, immovable property in the Bhimthadi taluka, by way of charge as security for the maintenance which may be decreed. That being the question to be determined, it is a question directly within the terms of S. 16 (d), Civil P. C. We therefore think that the learned Judge was in error. We must set aside his order and direct that the suit do proceed against defendant 1 but we think that the Court had no jurisdiction against defendant 2. Costs, costs in the cause.

G.P./R.K.

*Order set aside.***A. I. R. 1916 Bombay 273**

SCOTT, C. J. AND HEATON, J.

Madhavrao Hariharrao — Plaintiff—Appellant.

v.

Anusuyabai Eknath Jape and others—Defendants—Respondents.

Second Appeal No. 269 of 1914, Decided on 15th June 1916, from decision of Dist. Judge, Poona, in Appeal No. 192 of 1913.

(a) Civil P. C. (5 of 1908), S. 11—*Res judicata*—Judgment against person in whom estate vests is binding on his successor in spite of special mode of devolution as successor claims and litigates under same title—Claim for assessment held barred under Limitation Act (1908), Art. 130.

A mode of devolution prescribed in particular cases does not make the property subject to it

exempt from the effects of a judgment against the person in whom at the time the estate is vested. [P 274 C 2]

Neither a special mode of devolution nor an incapacity for alienation prevents limitation from operating against an estate: 9 *Bom.* 198 (*F. B.*), *Ref.* [P 274 C 2]

Plaintiff's brother, as saranjamdar, sued the predecessors in title of the defendants, in 1888, for recovery of possession of the suit lands on the ground that the defendants had ceased to perform service, and had been holding the lands wrongfully without payment of assessment. The suit was dismissed on the ground that the lands were not held by the defendants on condition of rendering service. On the death of his brother, plaintiff became saranjamdar and in 1912 sued the defendants for recovery of possession of the lands in suit on the same ground or, in the alternative, for assessment thereof:

Held: (1) that the suit was barred by *res judicata*, as the plaintiff claimed under his brother and was litigating under the same title as did his brother in 1888; (2) that the defendants and their predecessors in title had been holding adversely to the plaintiff since the decision in the suit of 1888, and the claim for payment of assessment was, therefore, barred by Art. 130, Lim. Act. [P 274 C 2]

Per *Heaton, J.*—The words 'between parties under whom they or any of them claim litigating under the same title' in S. 11, Civil P. C., are intended to cover, and do cover, a case where the later litigant occupies by succession the same position as the former litigant. The words are not intended to make any distinction between different forms of succession, whether it is by ordinary rules of inheritance or by special rules. [P 275 C 1]

(b) **Grant—Saranjam—Sanad or Government Resolution should be produced.**

Per *Heaton, J.*—It would be convenient that in saranjam cases the sanad or Government resolution, whichever it may be, which provides for the succession to the estate, should be produced. [P 275 C 1]

D. A. Khare and W. B. Pradhan—for Appellant.

P. B. Shingne—for Respondents.

Scott, C. J.—The plaintiff alleged that he was the saranjamdar of the ancestral saranjam village of Janu, where the lands in question were situate; that the lands were given to the defendants' ancestor on tenure in consideration of rendering certain shetsanadi services and that the lands continued in the defendants' possession by virtue of that tenure; and that the defendants had no longer been rendering any service, and did not deliver possession of the lands though called upon to do so, and he prayed for possession of the lands. In the alternative he alleged that if it should be held that the defendants were not holding under a service tenure, he as saranjamdar was entitled to recover the assessment of the lands, and prayed for

a declaration establishing his right to levy the assessment on the ground that he no longer wished to continue the land in inam with the defendants.

According to the plaint this is a hereditary saranjam village. Saranjams are held subject to the saranjam rules published by Government under the Schedule to Act 11 of 1852. R. 2 says:

"A saranjam which has been decided to be hereditarily continuable shall ordinarily descend to the eldest lineal male representative, in the order of primogeniture, of the senior branch of the family descended from the first British grantee or any of his brothers who were undivided in interest. But Government reserve to themselves the right for sufficient reasons to direct the continuance of the saranjam to any other member of the family, or as an act of grace, to a person adopted into the family with the sanction of Government. When a saranjam is thus continued to an adopted son, he shall be liable to pay to the Government a nazarana not exceeding one years' value of the saranjam."

Rule 5 says:

"Every saranjam shall be held as a life-estate. It shall be formally resumed on the death of the holder, and in cases in which it is capable of further continuance, it shall be made over to the next holder as a fresh grant from Government unencumbered by any debts or charges save such as may be specially imposed by Government itself."

The defendants rely upon the decision in Suit No. 458 of 1888 between the plaintiff's brother Laxmanrao Hariharrao and the predecessors in title of the defendants for the recovery of possession of the suit land on the ground that the defendants had ceased to perform service and had been holding the lands wrongfully without payment of assessment. That suit was decided in favour of the defendants, the Court holding that the lands were not held by the defendants on condition of rendering the service.

The first question that we have to decide is whether that decision operates as res judicata against the present plaintiff. That depends upon whether the present plaintiff can be said to claim under the plaintiff in the suit of 1888, and is litigating under the same title within the meaning of S. 11, Civil P. C. It appears from the saranjam rules, to which reference has been made, that the succession to the saranjam is in the plaintiff's family, and the plaintiff would be entitled to succeed as the eldest lineal male representative in the order of primogeniture upon the death of his brother Laxmanrao, the plaintiff in Suit

No. 438 of 1888. The estate is an estate which is bound according to the rules to continue in that family, and although on the death of a holder it is provided under R. 5 that there shall be a formal resumption and re-grant free from debts and charges to the next holder, there is no provision (as pointed out by the learned District Judge) for freedom from all tenures, rights, incumbrances and equities created in favour of any person other than Government, such as we find in S. 56, Land Revenue Code as amended by Bombay Act 6 of 1901. Subject to its being free from debts and charges, the new holder takes the estate as it was on the death of the previous holder, and he takes by virtue of his inheritance from the previous holder subject to the provisions of formal resumption and re-grant by Government.

Therefore, in our opinion, for the purposes of S. 11, Civil P. C., he claims under the previous holder and is litigating under the same title as did the previous holder in 1888. That conclusion, arrived at upon the words of the saranjam rules, is in accordance with the conclusion of the Full Bench of this Court in *Radhabai and Ramchandra Konher v. Anantrav Bhagvant Deshpande* (1) in the analogous case of vatan estates. For once it is established that the present saranjam holder obtains recognition by reason of his title by inheritance, there is no distinction between the two cases: the general principle stated by West, J., at p. 224 is that a mode of devolution prescribed in particular cases does not make the property subject to it exempt from the effects of a judgment against the person in whom at the time the estate is vested.

Since the date of the decision in the suit of 1888 the defendants and their predecessors in title have been holding adversely. It was complained in the plaint in 1888 that the defendants' predecessors in title held the lands wrongfully without payment of assessment, and it is not alleged that they have ever paid assessment since the decision of that suit. The claim, therefore, for payment of assessment is barred by limitation, for neither a special mode of devolution nor an incapacity for alienation will prevent limitation from operating against an estate: see *Radhabai and*

1. (1885) 9 Bom 198 (FB).

Ramchandra Konher v. Anantrav Bhagvant Deshpande (1). For these reasons we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Heaton, J.—There are one or two observations I wish to make in this case, and the first is, I think it would be much better and more convenient that in saranjam cases like this, the sanad or Government Resolution, whichever it may be, which provides for the succession to the estate, should be produced. The result of its non-production in this case is probably quite innocuous, but it is this: that we have had to conjecture where we ought to have had certain knowledge. We have had to conjecture that the succession to the saranjam was allowed according to the saranjam rules: a fairly safe conjecture to make no doubt. But where certain knowledge can be put before the Court I think it ought to be. Then as regards the meaning of the words in S. 11, Civil P. C., "between parties under whom they or any of them claim, litigating under the same title," I think those words are intended to cover, and do cover, a case where the later litigant occupies by succession the same position as the former litigant. In this case the former litigant was the saranjamdar for the time then being. The present litigant is the saranjamdar at the present time and is the successor of the earlier saranjamdar. I do not think that the words of the section are intended to make any distinction between different forms of succession. You may have a succession by the ordinary rules of inheritance, or you may have a succession by some very special rules as you have in the case of saranjams. That, I think, is not intended to affect the operation of the section of *res judicata*. I agree with the decree which was made.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1916 Bombay 275

SCOTT, C. J. AND SHAH, J.

Narayanbhat Bhimbhat Joshi and another—Defendants—Appellants.

v.

Akkubai Manoharbhat Joshi—Plaintiff—Respondent.

Civil Appeal No. 9 of 1915, Decided on 22nd September 1915, against order of Asstt. Judge, Belgaum, in Appeal No. 240 of 1913.

Civil P. C. (1908), S. 107 and O. 41, R. 23—Suit to set aside adoption on ground of fraud dismissed—Adoption sought to be set aside in appeal on ground of undue influence—Plaint allowed to be amended to be brought in accord with case put forward in appeal—Remand directing taking of supplementary written statement raising of fresh issues and decision is not permitted—Court in making such remand commits material irregularity—Appellate Court can give relief if it found case of undue influence established—Civil P. C. (1882), S. 564—Specific Relief Act (1877), S. 38.

A general power of remand cannot be inferred from the non-enactment of S. 564 of the old Civil Procedure Code. Such a provision is out of place in view of the rule making power reserved to High Courts under the present Code: 37 *Bom* 289, *Ref.* [P 276 C 2]

Although "undue influence" and "fraud" are dealt with under separate sections in the Contract Act (Ss. 19 and 19-A), "undue influence" is a branch of "fraud" in equity and invites the same relief in a case to set aside an adoption, under S. 38, Specific Relief Act. [P 277 C 1]

A deed of adoption was sought to be declared null and void on the ground that its execution was obtained by "fraud." The suit was dismissed. On appeal the adoption was sought to be set aside on the ground of "undue influence." The appellate Court allowed the plaint to be amended so that it might be brought in accord with the case put forward in appeal, and remanded the suit to the Court of first instance with the direction that, after taking a supplementary written statement, fresh issues should be raised in the new pleadings and the case decided on the merits:

Held: (1) that although under S. 107, Civil P. C., an appellate Court had power to remand a case subject to the conditions and limitations prescribed by rules, the rules under O. 41 containing the conditions of remand did not permit of such an order as the lower appellate Court had passed; [P 276 C 2]

(2) that the lower appellate Court had committed a material irregularity in requiring the Court of first instance to reconsider the whole case *de novo* and write another judgment: 16 *Mad* 299 (PC) and 19 *Mad* 479, *Ref.* [P 276 C 2]

(3) that there was nothing to prevent the lower Court of Appeal from giving relief if it found a case of "undue influence" established.

[P 277 C 1]

K. H. Kelkar—for Appellants.

Nilkant Atmaram—for Respondent.

Scott, C. J.—This suit was instituted by the plaintiff to obtain an injunction, which would give to her undisturbed control of the properties of her deceased husband, as against defendant 2 claiming to be her adopted son and for a declaration that he was not the adopted son and that the adoption deed alleged to have been passed by the plaintiff to defendant 2 was null and void on the ground that its execution was obtained by fraud. Para. 5 of the plaint contains

the particulars of the fraud alleged to the following effect:

"Defendant 1 told me that pattas had to be got written for tenants in respect of lands of my ownership and took me to Athni four months ago and went with me to the Sub-Registrar's Office and telling me he had papers prepared as mentioned by him and asked me to sign my consent to registration. My mother being dead I had, since my infancy, lived in defendant 1's house and my marriage took place there and therefore relying on defendant 1's word I gave my consent in the office of the Registrar. Excepting defendant 1 there was no one else to give me advice. 15 days ago I came to know the paper was an adoption deed in favour of defendant 2. I never gave him in adoption."

Defendant 1 is father of defendant 2, who is older than the plaintiff. She is alleged to have adopted him when she had just attained the age of 19 years. The defendants put in separate written statements and alleged that the circumstances alleged to have existed regarding the adoption deed were false. In the trial Court an issue was raised upon the point as follows :

"Are the circumstances mentioned in para. 5 of the plaint proved?" Much evidence was recorded on both sides and the learned Judge found the issue in the negative. He held that the fraud alleged to have been practised on the plaintiff in the matter of the alleged adoption was not established and that there was no evidence of misrepresentation as to the deed she was acknowledging before the Sub-Registrar or that she was defrauded or that she was the creature of the defendants. He proceeds to remark that:

"The plaintiff might also contend that she was the ward of defendant 1 and did not know what was meant by adoption, etc., and that the burden of proving absence of fraud rested on the defendants. To a certain extent this is quite true. The plaintiff was at the time of alleged adoption just 19 years old as can be seen from the verification on the adoption-deed taken by the Sub-Registrar and she cannot therefore be called a minor. The defendants have however satisfactorily proved the absence of fraud in having the adoption deed from the plaintiff, though there was no necessity for them to do so as can be seen from the issues raised."

The suit having been dismissed, an appeal was preferred which was disposed of by a remand order which is the subject of complaint on the part of the defendants. It was urged in appeal that the adoption should be set aside on the ground of undue influence. The learned Assistant Judge recorded his opinion that on the face of it such a transaction

was unconscionable and being of opinion that the whole burden of proof that the transaction was proper was on defendant 1 gave the plaintiff's adviser a month's time to amend the plaint so as to bring it into accord with the case put forward in appeal. When the case was next called on he granted leave to amend and remanded the suit to the lower Court which should, after taking a supplementary written statement, frame the issues raised by the new pleadings and decide the case on the merits. The defendants appealed against this order. Objection being taken that no appeal from such an order is allowed by the Code we treated the application as under S. 115, Civil P. C. The pleader for the respondents has been unable to refer us to any rule under O. 41 which would authorise such a remand order by the lower Court. But reference has been made to S. 107, Civil P. C., and to the fact that S. 564 of the old Code has not been re-enacted. S. 107 says that an appellate Court shall have power to remand a case subject to such conditions and limitations as may be prescribed (that is, by the rules): but the rules under O. 41 containing the conditions of remand do not permit of such an order as the Assistant Judge has passed.

That a general power of remand can be inferred from the disappearance of S. 564 is a proposition to which a Bench of this Court declined to accede: see *Narottam Rajaram v. Mohanlal Khandas* (1). We think such a provision would be out of place in view of the rule making power reserved to High Courts under the present Code. As the rules stand we are of opinion that the learned Judge has committed a material irregularity which requires correction. He could re-appreciate the evidence which appears to have been ample and could allow necessary amendments of pleadings consistent with the case made in the lower Court but he could not require the lower Court to re-consider the whole case de novo and write another judgment: see *Venkata Varatha Thatha Chariar v. Anantha Chariar* (2) and *Mallikarjuna v. Pathaneni* (3).

No amendment of the pleadings so as to make out a new and inconsistent case

1. (1913) 37 Bom 289=17 I C 891.

2. (1893) 16 Mad 299 (PC).

3. (1896) 19 Mad 479.

should be allowed. The proposed amendment indeed is not of that character. There was, in our opinion, nothing to prevent the Court from giving relief if it found a case of undue influence established. Such a case would not be inconsistent with the allegations in the pleadings and the case made for the plaintiff and although undue influence and fraud are dealt with under separate sections in the Contract Act (Ss. 19 and 19.A) (which perhaps the learned Judge had in mind) undue influence is a branch of fraud in equity and invites the same relief in such a case as the present under S. 38, Specific Relief Act. We set aside the lower appellate Court's remand order and direct that Court to dispose of the case on the evidence without prejudice to its power to act within the limits of O. 41, R. 25 or R. 27 if occasion should arise. Costs, costs in this appeal.

G.P./R.K.

Order set aside.

A. I. R 1916 Bombay 277

BEAMAN AND HEATON, JJ.

Mota Holiappa and others—Defendants—Appellants.

v.

Vithal Gopal Habbu—Plaintiff—Respondent.

Second Appeal No. 587 of 1915, Decided on 7th August 1916, from decision of Dist. Judge, Kanara, in Suit No. 77 of 1915.

Civil P. C. (5 of 1908), S. 11—Res judicata—Issue immaterial to decision decided and embodied in decree—It is not res judicata against party having decree in his favour.

Where an issue not material to a decision has been decided and is not embodied in the decree, it will not constitute res judicata against the party who, by reason of the decree being in his favour, would not be in a position to appeal against the decision upon the separable single issue. [P 277 C 2; P 278 C 1]

Where a suit is filed for a declaration and a consequential relief, and the decree grants the declaration but dismisses the suit owing to a technical flaw, the decision operates as res judicata in respect of the issue found in plaintiff's favour.

The defendant obtained, in 1900, a mulgeni lease from plaintiff's predecessor-in-title, who was then the manager of a temple. In 1910 the plaintiff sued to eject the defendant on the ground that the mulgeni lease was not binding on him and that he was entitled to evict defendant as a yearly tenant. The Court found the lease invalid, but dismissed the suit for want of notice to quit. The plaintiff, after service of the usual notice, filed the present suit in ejectment. The defendant again pleaded the mulgeni lease in his favour:

Held: that the matter was res judicata: 18 597; 23 Bom 296; 18 Cal 647 and 40 Cal 29, Dist. [P 278 C 1]

G. S. Mulgaonkar—for Appellants.

Nilkanth Atmaram—for Respondent.

Judgment.—We are clearly of opinion that if this suit were not res judicata by the decision of the suit of 1910, the plaintiff's claim would be barred by limitation. The only substantial question therefore is whether the present suit is res judicata. The point arises in this way: In 1900, the defendant obtained a mulgeni lease from the manager of the temple, the predecessor-in-title of the plaintiff. In 1910, the plaintiff sued, the suit taking the form of ejectment, to recover possession of the land from the defendant on the ground that the mulgeni lease was bad and no longer binding on him and that for breach of condition of the annual lease, therefore the tenant was liable to immediate eviction. The plaintiff prayed for two quite distinct reliefs, as is made abundantly clear from the judgment and the final order. Those reliefs were, first, that it should be declared that the mulgeni lease of 1900 was invalid and not binding upon the plaintiff; second, that the plaintiff was thereafter entitled to evict the defendant as chalgeni or yearly tenant from the land in suit. The Court decided in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendant, that is to say, the suit was for a declaration and consequential relief, and the decree grants the declaration but dismisses the rest of the prayer of the plaintiff on account of a technical flaw.

Those being the facts, the case is clearly, we think, distinguishable from the authorities to which our attention has been drawn, such as *Ghela Ichkaram v. Sankalchand Jetha* (1); *Rango Balaji v. Mudiyeppa* (2); *Thakur Mogundeo v. Thakur Mahadeo Singh* (3) and *Parbat Debba v. Mathura Nath Banerjee* (4). The general rule deducible from these cases is one which has our complete concurrence, viz., that where an issue not material to the decision has been decided and is not embodied in the decree, it will not constitute res judi-

1. (1894) 18 Bom 597.

2. (1899) 23 Bom 296.

3. (1891) 18 Cal 647.

4. (1913) 40 Cal 29=15 I C 453.

cata against the party who by reason of the decree being in his favour would not be in a position to appeal against the decision upon the separable single issue. That is not the case here. As we pointed out, the decision of the Court in favour of the plaintiff upon the first part of his prayer finds a place in the decretal order and is as much decreed as the other part of the prayer which in the second part of that decretal order was rejected. In our opinion this constitutes clear *res judicata* so far as the point now before us is concerned. We think that the defendant in that suit might have appealed, had he wished to do so, against so much of the decree as declared his *mulgeni* lease invalid and no longer binding upon the present plaintiff. We think the whole difficulty has arisen out of an unfortunate looseness of language in the latter part of the decree. What the learned Judge undoubtedly meant was not that the plaintiff's suit is dismissed, but that the rest of the plaintiff's suit is dismissed and this is made the clearer by the order of the Court which immediately follows: "Each party to pay its own costs," the learned Judge evidently having been of the opinion, that the plaintiff had succeeded on at least half the claim and the defendant on the other half. And we need only add that the part on which the plaintiff succeeded is by far the most substantial and important. This being our view it necessarily follows that the present appeal fails and the decision of the lower Courts must be confirmed with all costs.

G.P./R.K.

*Decree confirmed.***A. I. R. 1916 Bombay 278**

SCOTT, C. J. AND SHAH, J.

Ramchandra Narayan Joshi and others
—Defendants—Appellants.

v.

Shripatrao Tukojirao Deshmukh and others—Plaintiffs—Respondents.

Appeal No. 50 of 1914, Decided on 1st October 1915, from order of Dist. Judge, Sholapur, in Appeal No. 96 of 1913.

Civil P. C. (1882), S. 371—Redemption suit by one coparcener of Hindu joint family—Abatement of suit on plaintiff coparcener's death—Suit not in representative capacity—Fresh redemption suit by other coparceners is not barred.

If the manager of a joint Hindu family sues

to redeem a mortgage on behalf of all his coparceners he should at least purport to sue in a representative capacity. But if he does not sue in a representative capacity, the suit would be defective according to all canons of procedure; and should such a suit be directed to abate on the death of the plaintiff coparcener a fresh redemption suit by any other coparcener shall not be barred, inasmuch as no legal proceeding by the deceased coparcener alone short of actual redemption could deprive his coparceners of their right to redeem against the mortgagee.

[P 279 C 1, 2]

Campbell and K. N. Koyajee—for Appellants.

Coyajee and N. V. Gokhale—for Respondents.

Scott, C. J.—The facts found by the District Judge are that one Vyankatrao Deshmukh mortgaged on 21st March 1861 the lands in suit in favour of two mortgagees, and subsequently the interest of the second mortgagee became vested in the first mortgagee. In 1881 Vyankatrao instituted a suit, No. 399 of 1881, against the mortgagee for redemption, but after issues were settled in that suit he died, the date of his death being 9th July 1883. On 15th October 1883, the Court directed that the suit should abate. This suit was filed in 1912 by Tukojirao, Vyankatrao's son, and three grandsons for redemption upon the ground that the land mortgaged was ancestral property in which the plaintiffs, Vyankatrao's sons, had an interest with him at birth. It was also alleged that an adult brother of Vyankatrao was interested as a coparcener in the same property. In the trial Court the suit was dismissed on the strength of the order of abatement passed on 15th October 1883. An appeal was preferred to the District Court which reversed the order and remanded the suit for disposal. From that decree this appeal is now preferred. It is contended that by reason of S. 366 of the Code of 1882, the redemption suit is not maintainable by the present plaintiffs. That section must be read with S. 365 which provided that

"In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit;"

and S. 366 provided that

"If within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate."

Section 371 provided that

"When a suit abates or is dismissed under this Ch. 21, no fresh suit shall be brought on the same cause of action."

Now the time limited by law for an application under S. 365 was in 1883 two months. The order for abatement therefore was not without jurisdiction. The contention for the appellants in this appeal is that as Vyankatrao filed the redemption suit, he represented all persons interested in the mortgaged property, and after his suit came to an end, no further suit can be instituted by any one else. In support of that contention reference was made, particularly to the judgment of the Privy Council in *Kishen Parshad v. Har Narayan Singh* (1) and a Full Bench decision of the Allahabad High Court in *Hori Lal v. Nimmam Kunwar* (2). With regard to the Privy Council case, we are of opinion that all that was decided was, as stated by Chamier, J., in his judgment in *Hori Lal v. Nimmam Kunwar* (2), that managing members of a joint family entrusted with the management of a business are competent to enforce at law the ordinary business contracts which they are entitled to make or discharge in their names. We cannot regard it as an authority with regard to redemption suits. The contemporaneous decision of the same Bench, *Madan Lal v. Kishen Singh* (3), indicates that if a manager sues on a mortgage on behalf of all his coparceners he should at least purport to sue in a representative capacity, as was suggested by West, J., in *Gan Savant Bal Savant v. Narayan Dhond Savant* (4). There is no indication here that Vyankatrao's suit was brought in a representative capacity. If not, it would certainly be defective as a redemption suit according to all canons of procedure, e. g., Chs. 3 and 5 of the Code of 1882: *Gan Savant Bal Savant v. Narayan Dond Savant* (4), *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* (5) and *Bolton v. Salmon* (6). If the suit was defective, Vyankatrao's personal right to sue did not embrace the rights of his coparceners and none of them can be concluded by the application of S. 371. In

coming to this conclusion we have not overlooked illus. (d), S. 361 of the Code of 1882, which treated the father's right to sue his coparceners for partition as including the right of suit of his own sons. Whether that illustration was consistent with the principles of Hindu law or not we need not here inquire, for Vyankatrao at the time of his death had a brother who was also interested in the equity of redemption. Apart from the question raised upon S. 371, we think that the two Bombay cases above cited are sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceeding by Vyankatrao alone short of actual redemption would deprive his coparceners of their right to redeem against the mortgagee. The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority, express or implied, a mortgage of family property, without joining the coparceners interested, results from the authorized mortgage which carries with it the all embracing remedy: see the opinion of Pontifex, J., quoted by the Judicial Committee in *Daulat Ram v. Mehr Chand* (7). It does not follow that the defeat of one co-owner who desires to redeem will bar the exercise of the same right by another: hence arises the necessity for joining all parties interested in one suit.

It must not be taken from the above remarks that we assent to the view that the provision of the Code which refers to representative suits can properly be applied to suits on behalf of a Hindu family by its manager. We affirm the decree and dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

7. (1888) 15 Cal 70=14 I A 187 (P C).

A. I. R. 1916 Bombay 279

SCOTT, C. J. AND BEAMAN, J.

Vishvanath Ganesh Joshi and another
—Defendants—Appellants.

v.

Bala Kaku Kapadi and others—Plaintiffs—Respondents.

Second Appeal No. 142 of 1914, Decided on 1st December 1915, from decision of Actg. Dist. Judge, Ratnagiri, in Appeal No. 218 of 1913.

(a) Transfer of Property Act (1882), S. 55 (2)—Land sold professed to be burdened only by yearly tenancy subsequently

1. (1911) 38 I A 45=9 I C 739 (P C).

2. (1912) 34 All 549=15 I C 126.

3. (1912) 34 All 572=15 I C 138.

4. (1883) 7 Bom 467.

5. (1886) 10 Bom 21.

6. (1891) 2 Ch 48=60 L J Ch 239.

found to be burdened by yearly tenancy—Purchaser is entitled to damages.

Where a seller professed to transfer by a sale-deed to the buyer particular plots of land burdened only by a yearly tenancy, and the buyer subsequently found that they were burdened by a permanent tenancy:

Held: that there was a clear case of a broken contract or warranty for which the purchaser was entitled to claim damages without rescinding the purchase. [P 281 C 1]

(b) **Transfer of Property Act (1882), S. 55(2)—Sale complete—Vendor is not liable to pay damages for mere errors of quality or quantity.**

After the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser.

[P 280 C 2; P 281 C 1]

V. B. Virkar—for Appellants.

K. N. Koyajee and *B. V. Desai*—for Respondents.

Scott, C. J.—The plaintiff, by a sale-deed of 9th November 1908 took a transfer of certain immovable property from defendants 1 and 2 in which it was stated by the transferors that plots bearing serial numbers 2 to 4 are given for cultivation to Sayyad Ali Bavasaheb under an oral agreement for one year on a makta (rent) of Rs. 5-12 0, and having paid the consideration money he was obstructed in his attempt to obtain possession of these plots by the alleged yearly tenants who claimed to be permanent tenants. He therefore has brought this suit against his vendors and the tenants to recover possession of the land from the tenants or, in the alternative, to recover Rs. 600 as damages from the vendors on account of the misrepresentation in the sale-deed as to the nature of the tenancy. It has been held that the tenants are permanent tenants, and with that question of fact we cannot interfere in second appeal.

The more difficult question is whether the defendants are liable to pay damages to the plaintiff in consequence of their statement contained in the sale-deed with reference to the tenancy of the occupants of the plots above mentioned. Both Courts have held that the plaintiff is entitled to damages and the lower appellate Court has differed from the trial Court only in granting the plaintiff substantial, instead of unsubstantial,

damages. Defendants 1 and 2, who are the vendors, expressed their willingness to refund the price and cancel the sale. This however the plaintiff is not prepared to consent to. He only wishes for damages in respect of that portion of that land which is held on permanent tenancy. There is no doubt that there has been a serious misdescription of the plots with which we are now concerned, and that the purchaser has got something of less value than what he had reason to believe he was buying from the statement contained in the conveyance. Most of the English authorities referred to do not afford much assistance in the case, because there was in them generally a stipulation in the contract made before conveyance entitling the purchaser to compensation for misdescription, and the question has arisen in England whether such compensation can be claimed after the purchaser has proceeded to completion by taking a conveyance. In such cases the question appears to have been now settled in favour of the purchaser by the decision of the Court of Appeal in *Palmer v. Johnson* (1). Here however we have not got any preliminary written contract, and no express stipulation prior to conveyance. On the other hand, we have in the Transfer of Property Act a provision in S. 55 (2) that

“the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same.”

Now here the seller has professed to transfer to the buyer these particular plots of land burdened only by an yearly tenancy, and the buyer now finds that they are burdened by a permanent tenancy. The profession is as to the extent of the reversionary interest of the vendor. The purchaser therefore would be entitled to sue upon the implied contract expressed in the sub-section which we have just referred to, and to recover damages for the breach of it. It would seem from the dictum of the Court in *Jolliffe v. Baker* (2) that

“after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained

1. (1883) 13 Q B D 351.

2. (1883) 11 Q B D 255.

in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser."

The contract, which would by the terms of the Conveyancing Act, 1881, S. 7 [which came into force after the conveyance in *Jolliffe v. Baker* (2)] be implied, is more limited than the implied contract under S. 55 (2), T. P. Act. Such implied contract would be in the nature of the warranty referred to in *Jolliffe v. Baker* (2). There can be no doubt as to the quality of the subject-matter represented in the present case. It is found by the lower Court that the insertion as to the particular nature of the lessees' holding in the transfer-deed was made at the desire of the purchaser. We think therefore that there is a clear case of a broken contract or warranty for which the purchaser is entitled to claim damages without rescinding the purchase. The damages have been fixed by the lower appellate Court, and the decision upon that point has not been attacked on any ground of law, and is therefore binding upon us. We affirm the decree and dismiss the appeal with costs. Separate sets of costs. Defendants 1 and 2 must pay half the costs of the plaintiff throughout. In other respects the decree is affirmed. Respondent 1's cross-objections 3 and 4 are allowed to be withdrawn as they do not exist for want of notice.

G.P./R.K.

Decree affirmed.

A. I. R. 1916 Bombay 281

SCOTT, C. J. AND HEATON, J.

Bapuji Jagannath—Defendant—Appellant.

v.

Govindlal Kasandas Shah—Plaintiff—Respondent.

Appeal No. 47 of 1915, Decided on 14th February 1916, from order of Joint Judge, Ahmednagar, in Appeal No. 172 of 1913.

Civil P. C. (1908), S. 92—Suit by executor against another charging him with misapplying of property praying for permanent injunction restraining defendant from managing without plaintiff's consent—Suit not framed in relation to any charitable or religious object—Suit might be treated as administration suit by one trustee against another with whose conduct he was dissatisfied.

One of the two executors of the will of a Hindu sued his co-executor, charging him with having misapplied the property of the testator and praying that the defendant should be held responsi-

ble for all sums of money which would be found to have been given or caused to be given to friends and relations, or proved to have been mismanaged, after taking an account, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing. There was not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts, and the plaint contained no description of the trusts or directions contained in the will of the testator.

Held: (1) that the suit might be treated as a general administration suit brought by one trustee against another with whose conduct he was dissatisfied; (2) that S. 92 did not apply and that if any question relating to charitable bequests should arise in the case, a notice might be given to the Advocate-General in order that that officer might decide whether any action should be taken under S. 92; (3) that it would be quite possible for the Court to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate General or the Collector had obtained the directions of the Court, if such were necessary, with reference to the disposal of those funds under some suitable scheme under S. 92.

[P 281 C 2; P 282 C 1, 2]

G. N. Thakor—for Appellant.

T. R. Desai—for Respondent.

Scott, C. J.—The plaintiff brought this suit as one of two surviving executors of the will of one Harjivandas Purshottam, dated 15th June 1892. The defendant executor is alleged to be an Audich Brahmin of the age of 80, and is charged with having misapplied the property of the testator, and prayer is that the defendant should be held responsible for all sums of money which would be found to have been given, or caused to be given, to friends and relations, or proved to have been mismanaged, after taking an account from the year 1899, and onwards, since when he has been in sole management of the property of the late Harjivandas, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing. The plaint is a document of some length, and contains no description of the trusts or directions contained in the will of the testator. But the suit may be treated as a general administration suit brought by one trustee against another with whose conduct he is dissatisfied, and the stamping of the suit as a suit for an account at the value of Rs. 150 does not prevent the Court from

imposing an adequate court-fee in the event of any decree being passed for the payment of money by the defendant. That, however, is not the question now before the Court: it is whether the learned Judge in the District Court was wrong in remanding the case for trial after the suit had been rejected by the Subordinate Judge on the ground that it was a suit framed under S. 92, Civil P. C., and as such could only lie in the District Court.

There is not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts. There is no prayer for relief of any of the kinds specified in that section, and upon the face of the plaint we see no reason for holding that the Subordinate Judge had not power to entertain the suit. That learned Judge, however, states in his judgment that from the will it appears that the property was worth about Rs. 89,500, out of which private legacies amount to Rs. 19,500 and the rest Rs. 70,000 are to be used for purely charitable and religious purposes. The learned joint Judge in appeal pointed out that it did not follow that because money was to be used for the benefit of charities, therefore a scheme would be necessary in the case of those charities. In England the difficulty arising from superior and inferior jurisdictions does not arise, and any question relating to charitable bequests could be disposed of in an administration suit by the addition of the Attorney-General, who corresponds to the Advocate-General in this country, as a party to the suit. As an instance, we may refer to *In re Lea, Lea v. Cooke* (1), which was a general suit for administration. The report relates to a question arising with reference to a particular charitable bequest, involving the question whether a scheme should be framed or whether money should be paid by the executors direct to the legatee named as the controller of the charity.

It appears to us that if any questions relating to charitable bequests should arise in the present case before the Subordinate Judge, his proper course would be to give notice to the Advocate-General in order that that officer might decide whether any action should be taken under S. 92, Civil P. C., in order to get

1. (1887) 34 Ch D 523.

any of the specific reliefs referred to in that section. It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate-General or the Collector had obtained the directions of the Court, if such were necessary, with reference to the disposal of those funds under some suitable scheme. Such directions, of course, would have to be taken from the District Court under S. 92. But we know nothing at present of the position of the charities in question. We do not know whether any schemes will be necessary, and it appears to us, as it appeared to the joint Judge, that it will be altogether premature to say that this suit, as framed, cannot be disposed of by the Subordinate Judge.

The only other question which has been referred to is, whether the joint Judge was wrong in not giving effect to what has been described as an application for a decree in terms of the compromise. We have been referred to documents upon which the point is based, and it appears that there was no application for a decree in terms of the compromise. There was only a mention of a previous agreement, and it was requested that the Court would admit the papers on the proceedings. According to the judgment of the joint Judge the only issue raised before him at the time of the appeal was whether the lower Court had erred in holding that the suit fell within the purview of S. 92, Civil P. C., and that the Court had no jurisdiction to entertain it. Upon that issue we think that the joint Judge was right in holding in the affirmative and in remanding the suit. We affirm the order and dismiss the appeal. Costs costs in the cause.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 282

BEAMAN AND HEATON, JJ.

Bhagwant Gopal Galapure—Appellant.
v.

Appaji Govind Galapure—Respondent.

Second Appeal No. 1122 of 1915, Decided on 29th August 1916.

Contract Act (1872), S. 55—Plaintiff and defendant agree to exchange their houses on condition of plaintiff's constructing a well and a sink in his house within stipulated time — Plaintiff fails—Afterwards plaintiff waits to enforce agreement—Defendant resists saying time being essence of the contract it was now voidable—Held that defendant's silence did not show time as an essence.

In March 1911, a consent decree was passed in a suit whereby the houses of the plaintiff and defendant were to be exchanged after plaintiff had constructed on his premises a well and a sink. These additions were to be made and the exchange effected by the end of June 1912. The additions not having been made within the stipulated time, the plaintiff applied for execution in 1914. The defendant contended that, as time was of the essence of the contract, so much of the consent decree was voidable as his option:

Held: that time was not of the essence of the contract, as it was clear from the defendant's conduct by not protesting against the delay in the carrying out of the additions by the plaintiff that he did not regard time as of vital importance. [P 283 C 2]

P. V. Kane—for Appellant.

P. B. Shingne—for Respondent.

Beaman, J.—The plaintiff sued the defendant and a consent decree was taken in March 1911. One of the terms of the consent decree was the exchange of the plaintiff's house for one of the defendant's houses after the plaintiff had constructed on his premises a well and a sink. These additions were to be made and the exchange effected by the end of June 1912. We are informed in argument that the work was commenced some time before the end of June, but we have no materials upon which to conclude when it was finished. It is however common ground that these additions were not made within the stipulated time. Two years later, in 1914, the plaintiff applied for execution. The defendant resisted, so far as this term of the contract was concerned, on the ground that time being of its essence, so much of the consent decree was voidable at his option. The only question to be considered was whether time was or was not of the essence of this term in the consent decree. Both the lower Courts came to the conclusion that it was not. Speaking here for myself, I have not much admiration for the equity rule that in buying or selling or otherwise transferring real estate a man must never be allowed to mean what he says. That if he says the bargain is to be concluded within six months, he must not be taken to mean six months, but any reasonable time which, according to the view of the

Courts, may extend to six or sixty years. The rule is however venerable and has the sanction of such high authority that it is useless now to criticise it, and, we think, that this is a case in which we can fairly hold that at the time the consent decree was made, the defendant did not regard it as of vital importance that the additions, which were to be made to the plaintiff's house before the exchange could be effected, should be completed before 30th June 1912. He has endeavoured to show that he intended time to be of the essence of the contract, by asserting that he had entered into another bargain to exchange this house as soon as he obtained it in July 1912 for a field, and that in consequence of the exchange not being effected within the time stipulated, that bargain fell through. Had this been true however it appears to us that the defendant would certainly have taken steps to compel the plaintiff to be more expeditious in completing the additions which had to be made, before the house could be exchanged.

It is no part of the defendant's case here that either during the 15 months which intervened between the consent decree and the end of June 1912, he attempted to expedite these additions in any way or that when he found they were not completed by the end of June 1912, he made any complaint or protest to the plaintiff on that account. If he had really deemed time to be of the essence of the contract, we should have expected some such conduct on his part. There is no trace of it. Until the darkhast was taken out in 1914, the defendant gave the plaintiff no notice whatever that he intended to treat this term of the consent decree as now void. For these reasons we think on the whole that the conclusion arrived at by the lower Courts is right and that this appeal must be dismissed with all cost.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 285

SCOTT, C. J. AND SHAH, J.

Gangabai Pirappa — Appellant.

v.

Bandu Pirappa—Respondent.

Second Appeal No 668 of 1914, Decided on 10th December 1915, from decision of Dist. Judge, Sholapur, in Appeal No. 203 of 1912.

(a) **Hindu Law—Inheritance—Illegitimate sons are on level with dasiputra.**

Among Sudras the illegitimate sons of a kept woman or concubine are on the same level as to inheritance as the dasiputra or the son of a female slave by a Sudra. [P 284 C 2]

(b) **Hindu Law—Inheritance—Illegitimate son's is half that of legitimate son or daughter.**

An illegitimate son's share must be determined by dividing the whole estate in such a way as to give each of the illegitimate sons exactly half of the share of each of the legitimate sons.

[P 2-5 C 2; P 286 C 1]

An illegitimate son, in competition with a legitimate daughter, would have the same share as he would have in competition with a legitimate son. [P 285 C 2]

J. R. Gharpure—for Appellant.

K. H. Kelkar—for Respondent.

Shah, J.—One Pirappa, by caste a Lingayat, died in 1907, leaving him surviving a wife Limbabi, who had no issue, a Mohatar wife, who had two daughters, and the present plaintiff who claims to be his illegitimate son by a concubine Sitabai, who was by caste a Shimpi woman. All these persons except the plaintiff and the defendant, who is one of the daughters by the Mohatar wife, are dead. The plaintiff sued to recover possession of the property of Pirappa from the defendant. The defendant urged that the plaintiff had really no interest in the property as he could not claim the position and rights of a dasiputra according to Hindu law, and it was also urged that the connection between Sitabai and Pirappa being adulterous and forbidden by law, the text applicable to a dasiputra would not apply to the plaintiff. The plaintiff's claim for the whole property was not allowed; but it was found that he was a dasiputra and as such entitled to a moiety of the property in suit, and a decree was passed by the trial Court on that footing. The lower appellate Court has affirmed the decision of the trial Court. It is found by both the lower Courts that the plaintiff is the illegitimate son of Pirappa, who had kept Sitabai as his mistress. It is also found that Sitabai's husband died when she was very young, and that she was a widow living with Pirappa, when the present plaintiff was born. It is common ground that the parties are governed by the law applicable to Sudras.

Mr. Gharpure's first contention is that the plaintiff is not a dasiputra, that he is born of an adulterous connection for-

bidden by law, and that the texts relating to an illegitimate son do not apply to him. It is clear however that the condition that the Sudra woman of whom the illegitimate son is born, should never have been married to any man has been discarded in the Presidency of Bombay, as pointed out by Sir Michael Westropp, C. J., in *Rahi v. Govinda* (1). It is also observed in the same case at p. 115 of the report, and the observation is repeated in the later case of *Sadu v. Baiza* (2), that among Sudras the illegitimate sons of a kept woman or concubine or on the same level as to inheritance as the dasiputra or the son of a female slave by a Sudra. It is clear that Sitabai's connection with Pirappa as his mistress being established, the present plaintiff, who was born when that connection subsisted, must be treated as the illegitimate son of Pirappa and is entitled to all the rights which a dasiputra would be entitled to on the facts of this case.

The second question raised in the course of the argument is that in any case the lower Courts are wrong in allowing the plaintiff a moiety of the whole property, and that the plaintiff is entitled to a moiety of the defendant's share, i. e., to one-third of the whole estate. This point was not raised in either of the Courts below and has not been taken in the memorandum of appeal here. We have allowed the point to be argued, though not without reluctance, as it was pressed upon our attention as a point of law not involving any fresh finding of fact. An examination of the texts and the decided cases bearing on the point shows that the point is by no means easy to decide. We feel certain however that whatever may be the proper share to be awarded to the plaintiff, it could not be more than one-third of the whole estate. At the outset it may be mentioned that Pirappa had two daughters. But it is not suggested by Mr. Gharpure that on that ground, on the footing upon which he argues for the plaintiff's share being one third, his share would be really one-fifth of the whole estate. This aspect of the question has not been put forward in the argument, and we mention it only for the purpose of making it clear that the

1. (1875-77) 1 Bom 97.

2. (1879-80) 4 Bom 37.

extent of the plaintiff's share is determined on the footing that Pirappa had only one daughter.

The fact that Pirappa left two widows behind him, makes, in our opinion, no difference in the extent of the plaintiff's share. The point whether in case of daughters and an illegitimate son, the widow of the deceased has only a right of maintenance or takes the estate of the deceased to the exclusion of the daughters is a point upon which there has been some difference of opinion; but that question really does not arise in this case. It is enough to point out that it has nothing to do with the extent of the illegitimate son's share, which must be determined with reference to the number of legitimate sons or daughters or daughter's sons. The question of the extent of the illegitimate son's share has not been considered and decided in any of the cases bearing on the widow's right, which only dealt with the point whether she had any right to the property either when there were illegitimate sons or when there were legitimate daughters and illegitimate sons.

The provision as to the extent of an illegitimate son's share is to be found in the Mitakshara, Chap. 1, S. 12, placita 1 and 2: see Stokes' Hindu Law books, p. 426. Yajnyavalkya's text (Vyavaharadhyaya, verse No. 134) contains the word *ardhabhagika* (* * *) which is translated by Colebrooke as partaker of the moiety of a share. It is explained in the commentary by Vijnaneswara that after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment. It is further pointed out that if there be daughters of a wife, the son of the female slave participates for half a share only. Speaking with reference to the daughters, Vijnaneswara uses the word *ardhabhagika* (* * *) about the illegitimate son, which is the word used in Yajnyavalkya's text and which has been explained by him in the previous part of the commentary with reference to the sons of a wedded wife as meaning a sharer to the extent of one-half in a brother's allotment. Having regard to the context as well as the language used by Vijnaneswara, there can be no doubt that the illegiti-

mate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son. It may be that in some decided cases this view may not be found to have been uniformly acted upon. But there is no discussion on this point and we feel quite clear that the illegitimate son's share in this case should be calculated on that footing.

The question however as to the extent of that share is not so free from difficulty. There are two methods of determining the extent of the share. One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons. The other method is to divide the estate into as many shares as there may be sons, treating the illegitimate sons as legitimate sons, and then from one share to give half to each illegitimate son, and give the remainder to the legitimate sons. To take the simplest instance: if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares, two shares going to the legitimate son and one share to the illegitimate son. According to the other method the estate would be divided into two shares, and the illegitimate son will be given half of one share, that is, one-fourth of the whole estate, and the remaining portion, that is, three-fourths of the whole, will go to the legitimate son. This second method has been adopted by Vijnaneswara himself in dealing with the share of a sister. It has been explained by him at length in Chap. 1, S. 7, placita 6 to 10 (Stokes' Hindu Law books, pp. 398-400). If we had to make a choice between the two methods for the first time, as a matter of proper construction, we should have been inclined to adopt the second method.

The expression explained in S. 7, placita 6 to 10, by Vijnaneswara is *nijadanshat* (* * *) which is used by Yajnyavalkya in verse No. 124, while the expression, used by him in S. 12, placitum 2, is *swabhagat* (* * *) which is synonymous with the former. It is however unnecessary to pursue this point any further, as we think that the second method of determining the extent of the illegitimate son's share cannot be ac-

cepted now, though, in our opinion, it has the merit of Vijnaneswara's approval. In the first place Mr. Gharpure has not argued that it is the proper method to be adopted now. The decided cases in this Presidency show that it is the former method that is adopted, and the second method, though not expressly considered, must be deemed to have been rejected by necessary implication. Lastly, the other High Courts also have adopted the first mentioned method. On a point of this kind it is important that a rule, once laid down, should be adhered to unless there are exceptionally strong and clear grounds to justify a departure therefrom.

The case of *Dhodyela v. Malanaik* (3) decided by Melvill and Pinhey, JJ., shows that the shares of the illegitimate sons were calculated according to the first method. The same rule was adopted by Melvill, J., in *Sadu v. Baiza* (2). Though his judgment was upset in appeal on a different ground, the learned Judges in appeal expressed a clear opinion in favour of the view of Melvill, J., on the point now under consideration, though it was not necessary for the decision of the case. They observed (at p. 52 of the report) that :

"if Mahadu had not survived his father Manaji, then, indeed, under Mitakshara, Chap. 1, S. 12, placitum 2, Sadu would have been entitled to only half a share, i.e., one-third of the property, and the remaining two-thirds would have vested in Darya as the legitimate daughter of Manaji."

The same view has been recently taken in *Chellammal v. Ranganatham Pillai* (4) and the Allahabad High Court took the same view long ago in *Kesaree v. Samardhan* (5). Mr. Kelkar relied upon the case of *Shesgiri v. Girewa* (6) for the proposition that the illegitimate son would be entitled to a moiety of the estate. In that case however the plaintiff, who was one of the daughters, was awarded one-sixth share of the whole estate and the illegitimate sons, who were among the defendants, were allowed a moiety of the whole by the District Court. The illegitimate sons appealed against the decree and the plaintiff daughter had filed no cross-objections. The only point urged before, and decided by, the High Court was, whether the

illegitimate sons excluded the widow and the daughters altogether. The true extent of the plaintiff daughter's share was not decided by the High Court. The remark of Sir Charles Sargent, C. J., that the illegitimate sons were entitled to a half-share, apparently based upon the observation of Sir Michael Westropp, C. J., in *Rahi v. Govinda* (1), is apt to be misunderstood. No doubt, at p. 115 of the report of *Rahi v. Govinda* it is stated that the illegitimate son is entitled to a half-share. But in order to understand whether it was half of the whole estate or half of a legitimate son's share it is necessary to bear in mind the observations at p. 104 of the report, where Sir Michael Westropp, C. J., after referring to the Mitakshara, Chap. 1, S. 12, observes :

"If there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property."

Even if there be any doubt as to what was meant by that passage, Sir Michael Westropp's dictum in the later case of *Sadu v. Baiza* (2), which is already quoted, makes the meaning abundantly clear. There is no reason to suppose that Sir Charles Sargent did not understand Sir Michael Westropp's observation in that sense, and though the decree of the District Court in *Shesagiri's* case (6) may not be consistent with the view, which we have already expressed as being the correct view, to take of the extent of the illegitimate son's share, it is clear that there is nothing in the decision of the High Court which is inconsistent with that view. The point considered and decided in *Meenakshi Anni v. Appakutti* (7) was that the widow did not exclude the illegitimate sons altogether. The question as to the extent of the illegitimate son's share in competition with a legitimate daughter apparently did not arise in that case and was not decided.

For these reasons we are of opinion that the plaintiff is not entitled to more than a third of the property in suit. We accordingly modify the decree of the lower appellate Court by directing that the plaintiff should be awarded on partition one-third of the property in suit. In other respects the decree should be confirmed. Under the circumstances the appellant must pay the respondent's

7. (1910) 33 Mad 226=4 I C 299.

3. (1874) P J 43.

4. (1911) 34 Mad 277=12 I C 247.

5. (1873) 5 N W P H C R 94.

6. (1890) 14 Bom 282.

costs of this appeal, as the grounds mentioned in the memorandum of appeal have failed.

G.P./R.K.

Decree modified.

A. I. R. 1916 Bombay 287

MACLEOD, J.

Alimahomed Rahimtullah—Plaintiff.

v.

Pandurang Laxman and another—Defendants.

Original Civil Suit No. 1260 of 1915,
Decided on 13th December 1915.

Contract—Building contract—Parties agreeing that building contractor should be paid according to final certificate by architect—Certificate cannot be impeached except on ground of fraud.

Where under a contract to build a house, the parties have agreed that the building contractor should be paid according to the final certificate of the architect and that certificate is issued, the employer cannot impeach it except on the ground of fraud. If the architect is incompetent and makes mistakes in preparing the final bill then the employer has his remedies against the architect, but the building contractor is bound to be paid. [P 289 C 1]

The letters *E.* and *O. E.* commonly put in this country under a bill, have no effect whatever on its finality. [P 288 C 1]

Jinnah—for Plaintiff.

Inverarity—for Defendants.

Judgment.—This is one of those melancholy disputes between a building contractor and his employer which come before these Courts so frequently. Although the amount in dispute is small, the point at issue is an important one to architects and the persons who employ them. On 12th March 1914, plaintiff entered into a contract with Pandurang Laxman and Laxman Kashinath with reference to the work of building a house at Chandanwadi in Sonapur Lane. The agreement states that Pandurang Laxman and Laxman Kashinath, defendants in this suit, have got the plans in respect thereof passed by the Municipality through the engineer, Mr. Laxman Harischandra Chowdhari. Defendants had asked for tenders showing the rates for the said work, and out of the same they have accepted the tender of Alimahomed Rahimtulla, the plaintiff. Then it is agreed that the plaintiff's work was to be measured every month by the defendants' engineer and on receipt of the engineer's chiti they would pay the amount of the said chiti the

next day after keeping 10 per cent thereof as deposit. And as to the balance that might remain as deposit, when the plaintiff completed the defendants' work defendants would get their engineer to measure the same forthwith and would pay immediately all the moneys due to the plaintiff along with the final bill in full settlement.

Mr. Chowdhari was no doubt, the defendants' engineer for supervising the work which was being done by the plaintiff, and from time to time he wrote letters to the defendants that the plaintiff's work had been measured up and that so much money might safely be paid to him. On 7th June, Mr. Chowdhari wrote :

"Herewith please find the final bill of the work done by your contractor, Mr. Allibhai Rahimtulla, of your new building at Shankersett Lane, amounting to Rs. 14,989-5-2."

The bill is headed :

"Abstract of work done by Mr. Allibhai Rahimtulla, contractor of the building of Mr. Pandurang Laxman, of Mahadeo Sanker Sett Lane near Sonapur Lane."

It contained "quantities, description of work, rate, amount due." The total is Rs. 14,989-5-2, and after that the letters *E.* & *O. E.* and it is signed by Lakshman H. Chowdhari, L. C. E. Now the last thing the defendants wanted to do when they got the final bill from their engineer was to pay it. As it often happens, they endeavoured to get off paying what apparently was due by them. Defendant 2 who was called said he suspected Chowdhari's measurements were incorrect as the amount was too big. "I did not tell him that I was suspicious of his measurements." That is the secret of the whole difficulty. Defendants wanted to get a reduction off what appeared on Chowdhari's certificate because it was too big. But instead of telling Mr. Chowdhari that they thought his measurements were wrong, or his rates were wrong, they wait for several weeks and in the meantime ask another engineer, Daruvalla, to look at the bill and take measurements. It is not until Daruvalla made out a fresh bill that Chowdhari became acquainted with that fact. Mr. Daruvalla's bill is dated 11th August 1915. It does not appear when Mr. Chowdhari was first acquainted with it, but sometime after 11th August he asked his assistant to look over the measurements again and

compare them with Mr. Daruvalla's measurements and he found that his own bill might be reduced by Rs. 141-5-0, so he wrote on 16th October to the defendants :

" In continuation of my letter to you of 7th June last, forwarding the final bill of the work done by Mr. Allibhai, contractor please note that there have been some mistakes in it and that the bill has to be reduced by Rs. 141-5-0 as per following details."

Meanwhile before that correspondence had commenced between the plaintiff and the defendants. On 10th September, defendants' solicitors wrote.

" Our clients are not bound to pay to your client any amount which may be certified by Mr. Chowdhari. Mr. Chowdhari left the measurement of the work to a surveyor and our clients find that the measurements so taken are incorrect. The principle employed by Mr. Chowdhari for charging for particular kinds of work is also erroneous. He has also allowed rates for ornamental work which are in excess of the proper rates. Our client's finding that the bill made out by Mr. Chowdhari was incorrect have had the work remeasured and a proper bill made out by another engineer, Mr. B. B. Daruvalla, wherefrom it appears that the correct total amount of the bill for work done by your client is only Rs. 13,647-7-9. Deducting from it Rs. 12,900 admitted by your client as received from ours there remains only a balance of Rs. 747-7-9 due to your client and our clients are ready and willing to pay the same."

On 16th September, the defendants' solicitors wrote : " Our clients are quite prepared to hold a joint survey."

On the 17th, the plaintiff's solicitors wrote :

" Our client is not bound by the certificate of any engineer your client may choose to put forward now nor is he bound to hold a joint survey. Under the agreement your client is bound by the certificate of his own architect, Mr. Chowdhari."

There can be no doubt that in form the bill sent in on 7th June by Mr. Chowdhari to the defendants was a final bill. It is suggested that the letters E. & O. E. at the bottom prevented it from becoming a final bill. But it is not those letters which determine the nature of the bill but the contents of the bill itself. The bill is clearly a final bill for the work done by the plaintiff for the defendants. Those letters commonly put in this country under a bill have, as a matter of fact, no effect whatever. I certainly do not remember having seen those letters on any bill before I came into this country. But it does not follow that if those letters are not put there the bill cannot be revised before it is finally settled by payment,

or that even after payment has been made under certain circumstances the question of the amount cannot be reopened. Therefore it seems to me perfectly clear that that bill of 7th June was a final bill. Then, were the defendants bound to pay under the contract that bill. It was a final bill prepared by Mr. Chowdhari who was the engineer in June. Therefore the obligation to pay the bill arose from the terms of the contract I have already referred to, viz.

" when you complete our work we will get our engineer to measure the same forthwith and will immediately pay all the moneys due to you along with the final bill in full settlement."

That is a perfectly plain and unambiguous contract, and if an employer of a building contractor were at liberty after the final bill was sent in by the regular engineer to take it to another engineer because it did not satisfy him, then it would not be possible to say when the question of payment could be settled, because the bill might be taken to another engineer and then to a third engineer and so on and the obligation to pay might never arise according to the employer. The position in a contract of this sort between a contractor and his employer is well defined in the case of *Clemence v. Clarke* (1). There the same point was taken as taken here. The architect had not actually taken the measurements himself but had given that work to an assistant to do. Grove, J., at p. 45, says :

" Then I will assume that the taking out of the quantities and the measuring up was done by a surveyor. I do not see how any architect could ever discharge such a duty if he were required to personally go in detail into all the work. It may be that the measuring up, and the quality of the material in some classes of work could be properly got at by skilled persons who might be employed under the architect. The architect, though in certain parts of the document he is treated as an agent of the party, is for the purpose of this certificate a judge ; and if he were bound to do all the details of various kinds of work himself, in all probability he would be incompetent to do them : because although he is skilled as an architect—skilled as a person generally in surveying work—he may not be skilled in the particular details of all this general work. I do not think therefore—it being admitted that the architect has behaved with perfect honesty in the matter and that there is nothing in the shape of corruption or improper conduct attributed to him—that this certificate is the less final because he has taken the measurement of the works from another person, namely,

(1) (1879) 2 Hudson's Building Contracts 41.

the surveyor who has gone through the work and made a report of the measurements to him."

Mr. Chowdhari did check the measurements of his assistant, for he has told us from the entry in his diary that he went to the premises on 11th April and spent four hours going over the measurements and checking the most important items. Therefore, I do not think there is anything in the point taken by the defendants that Chowdhari did not perform his duty properly in preparing the final bill. At p. 52 of the same report Lindley, J., says :

"A certificate, of course, can be impeached for fraud : it may be impeached for collusion : on the other hand it cannot be impeached for mere negligence, or mere mistake, or mere idleness on the part of the architect."

Therefore, the parties agreed that the building contractor should be paid according to the final certificate of the architect and that certificate is issued. The employer cannot impeach it except on the ground of fraud. If the architect is incompetent and makes mistakes in preparing the final bill then the employer has his remedies against the architect, but the building contractor is bound to be paid. Therefore, in my opinion, the defendants were bound to pay under the bill of 7th June and if they discovered that Mr. Chowdhari had made mistakes, the defendants had their remedy against him. Now, after Mr. Chowdhari was acquainted with Mr. Daruvalla's measurements he sent his assistant to go over his own measurements with those of Mr. Daruvalla and he admitted, on 16th October, that there were certain mistakes amounting to Rs. 141-5-0. The plaintiff had nothing whatever to do with those mistakes, but he has in his claim deducted from the amount he demanded the amount admitted by Mr. Chowdhari to have been wrongly calculated. That under the circumstances was a very fair thing for him to do. In other respects it has been urged that the evidence showed that Mr. Chowdhari's bill was incorrect. The difference between Daruvalla's amounts and Mr. Chowdhari's chiefly lies in the measurements, but it has also been pointed out to me that in one instance Mr. Chowdhari had allowed a higher rate than was allowed in the contract.

That was for artificial panels. The

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item is a small one but it is instructive to show the inherent dishonesty of the defendants' case. First of all, I was told generally that Mr. Chowdhari had allowed higher rates than those appearing in the agreement. That was subsequently whittled down to the one rate for artificial panels. The contract rate was Re. 1-2-0. Mr. Chowdhari had allowed Re. 1-3-0. His explanation was that a part of the shutters instead of being of Kayal was made of Moulmein teak at defendant 2's instance. I believe Mr. Chowdhari that that was so. He was supervising the building and therefore he saw the shutters before they were painted, for Mr. Daruvalla has told nothing about this but sees in the agreement artificial panels. He sees these panels painted and takes it for granted that the panels are of Kayal teak, in order to prove that Mr. Chowdhari had overcharged defendants in his bill. Mr. Daruvalla did not even take the precaution of testing whether any part of the shutters was Moulmein teak. He sees the agreement and sees the shutters painted and says that Mr. Chowdhari has made a mistake. That is a small point, but in one way it goes to the very root of the defendants' objection to pay the plaintiff's bill. Then Mr. Chowdhari is said to have allowed plaintiffs higher rates than the market rates in cases where rates were not fixed by the agreement. I was handed by defendants' counsel a comparative statement in which those items were marked in blue pencil.

I find that in that statement the only item in which there is a difference is three blue stone chairs for the front. Mr. Chowdhari allowed Rs. 6, Mr. Daruvalla thinks Rs. 4 is the proper rate. The total difference would be Rs. 6. Therefore, these two instances in which Mr. Chowdhari is supposed to have made out his bill unfairly against the defendants, have been shown to be practically without foundation if not entirely so. It might be satisfactory from all points of view if I were to appoint an independent surveyor to go and measure the work, in which case I should be satisfied in my own mind as to what were the correct measurements although it might be said that the third man might also possibly err in his measurements. I am not going to do that on a

point of law. I am satisfied on a proper construction of the agreement that the defendants were bound by the certificate of Mr. Chowdhari. If they think they paid too much, then they can endeavour to recover the excess from Mr. Chowdhari. Unfortunately in the plaint, plaintiff refers to the letter of 16th October as a certificate. That is not a certificate. It is merely an annexure to the certificate of 7th June. It is a mistake in drafting. Para. 7 has been made use of by the defendants in order to contend that Mr. Daruvalla's certificate was final before Mr. Chowdhari's. However that is clearly an unsound contention, because there can only be one final bill prepared by an engineer and Mr. Chowdhari issued his final bill on 7th June. When the bill was prepared Mr. Chowdhari was the defendants' engineer. Before the building was completed they might have changed their engineer. As a matter of fact Mr. Chowdhari prepared the plans, supervised the building and prepared the final bill which the defendants were bound to pay.

Therefore there will be a decree of the plaintiff for Rs. 1,208-15-5 with interest on Rs. 1,200-3-5 at six per cent per annum from 15th October 1915 till judgment. Costs and interest on judgment at six per cent.

G.P./R.K.

Suit decreed.

A. I. R. 1916 Bombay 290

SCOTT, C. J. AND HEATON, J.

Daluchand Fulchand Gandhi—Plaintiff—Appellant.

v.

Gulabbhai Kanthadji — Defendant—Respondent.

Appeal No. 259 of 1914, Decided on 9th February 1916, from order of Joint Judge Ahmedabad, in Suit No. 17 of 1912.

Bombay Land Revenue Code (1879), Ss. 150, 154 and 111—Minor talukdar placed under guardianship of Collector—Mamlatdar attaching ornaments on account of unpaid assessment—Account books also removed for purposes of income-tax—Suit for damages for wrongful attachment of ornaments and seizure of account books—Mamlatdar is not liable for attaching ornaments—Seizure of account books is wrongful and mamlatdar is liable—Bombay Gujarat Talukdar's Act, (1888) — Income-tax Act (1884).

A minor talukdar was placed under the guardianship of the Collector and in consequence of this guardianship the Talukdari Settlement Offi-

cer and under him the mamlatdar had the revenue management of the talukdari village. The mamlatdar attached ornaments of a certain khatedar in the village on account of unpaid assessment of previous years. The account-books of the khatedar were also removed for the purposes of income-tax. The khatedar sued the mamlatdar for damages for wrongful attachment of ornaments and seizure of account books:

Held: (1) that the mamlatdar as a subordinate of the Collector had both under Ss. 150 and 154, Land Revenue Code and S. 111 of the said Code as modified by S. 33, Bombay Act 6 of 1888, power to attach the ornaments, or at least he and his superiors supposed that he had the power;

[P 292 C 2]

(2) that, supposing that the mamlatdar and his superiors made a mistake as to the law, the mistake, if any, was a bona fide mistake and it was made in pursuance of the provisions of the law;

[P 293 C 1]

(3) that attainment of majority by the talukdar before the occurrence of attachment did not affect the question, as the de facto management of the Government officers continued uninterruptedly, notwithstanding the event of the talukdar attaining majority, and in fact at his own request and with his consent;

[P 293 P 1]

(4) that the seizure of account books was unauthorized and wrongful, and for this act of his the mamlatdar was liable to pay damages, which under the circumstances of the case must be nominal.

[P 294 C 1]

T. R. Desai—for Appellant.

N. K. Mehta—Respondent.

Heaton, J.—The village of Moyad-vas-Rupaji is a talukdari village. The talukdar owner was at one time a minor and the District Court appointed a Government Officer as his guardian, and in consequence of this guardianship the Talukdari Settlement Officer and under him the mamlatdar of the Prantji Taluka had the revenue management of this village. The village was leased to a certain person in consideration of extinction of certain debts due from the talukdar. The latter part of the period of this lease became vested in one Makhwad Gafoor, and it was during this period that the events with which we are concerned happened. Makhwad maintained that the land-holders of the village were paying far too little by way of assessment. The khatedars maintained that they were paying what was customary and all that they could properly be called on to pay. Both sides sent petitions to the mamlatdar, and on 20th March 1911, this officer visited the village in order to find out for himself what was the true state of the case. As the result of what he discovered in the village he came to the conclusion as his subsequent reports clearly show, that

the lease-holder was receiving much less by way of assessment than he was entitled to. He whilst in the village caused the property of two of these khatedars to be attached.

He also advised Makhwad, the leaseholder, to file what are called assistance suits against certain of the khatedars for the recovery of what he claimed to be due for the current year. Some of these suits were subsequently disposed of by the mamlatdar in favour of the lease-holder. One of the persons whose property was attached, and against whom one of these suits was filed, was the plaintiff in this present suit, and briefly stated, the plaintiff asserts that on the occasion of the mamlatdar's visit to this village on 20th March 1911, he struck the plaintiff with a shoe and with a stick; that he wrongfully entered his house; wrongfully attached certain ornaments and wrongfully took away certain account books of his. The mamlatdar denies that he struck the plaintiff. He admits that he had the ornaments and the account-books taken away from the plaintiff, but submits that this was not wrongful, and in any event he pleads that he acted in pursuance of the law and is protected by S. 6, Bombay Revenue Jurisdiction Act. The really material issues of fact in this case are two: (1) whether the mamlatdar did strike the plaintiff, and (2) whether he attached the ornaments on account of arrears of assessment for past years, or on account of the assessment of the then current year. The Joint Judge of Ahmedabad who tried the suit found both these issues in favour of the mamlatdar defendant and he dismissed the suit entirely.

I will now deal with the first of these two issues. After having read the evidence, and heard it commented on, I can find no convincing reason for supposing that the Court below was wrong in holding that it was not proved that the mamlatdar had struck the plaintiff. There is no doubt that the events which have happened have given rise to a great deal of bitterness between the parties, and where this is so, and where we have as here, a considerable body of landholders in a village ranged on one side against the proceedings of a superior holder and a revenue officer, it is not to be expected that we should have an accu-

rate account of events from the villagers; it seems to me that where a Judge who heard the evidence and saw the witnesses, and, as in this case, disbelieved the evidence of a personal assault by the mamlatdar, it would require some very convincing reasons to justify a Court of appeal in reversing his conclusion. Those convincing reasons are not present in this case. So I think that the conclusion of the trial Judge on this point must be confirmed. The second issue arises in this way: Seeing that the assessment for the current year was due to the leaseholder who was a superior holder, it could only be recovered, if not duly paid, by the leaseholder who for this purpose can bring Assistance Suits or ordinary civil suits. The assessment for that year could not be recovered by the mamlatdar under the provisions of S. 150, Land Revenue Code. This is admitted. Therefore it is urged on behalf of the plaintiff that the attachments made by the mamlatdar were on account of the current year's assessment because if so, these attachments were admittedly illegal. But it is urged by the mamlatdar that these attachments were made on account of unpaid assessment of previous years and moreover prior to the period of the lease, and that he had power to attach for the recovery of such arrears. Hence arises this issue of fact, as to whether the attachment was on account of the current year's assessment or on account of the assessment of previous years.

Now there is in the case correspondence which shows that there were arrears of previous years, and that the plaintiff was liable to pay a certain amount of such arrears. It is asserted, and the assertion is borne out by the correspondence itself, that the existence of these arrears was brought to the notice of the mamlatdar on 20th March whilst he was present in the village. Ex. 78 is a report of the talati bringing the matter of arrears to the notice of the mamlatdar. The mamlatdar's subsequent reports also show that he had made attachments by way of enforcing payment of such arrears. Unless therefore there is some reason for supposing that these papers, in particular the talati's report which bears date 20th March, were prepared subsequently in order to support the case which is now put forward, there is very

good reason for supposing that the mamlatdar's account of the matter is correct. I can find no good reason for supposing that these papers have been prepared subsequently, or are in any way other than they purport to be, except one, and that reason is this: that in the panchnama (Ex. 80) recording the attachment it is stated twice over that the attachment is made on account of the current year's arrears. The mamlatdar and the talati both explain that this is a verbal error. It is undoubtedly the kind of error that does sometimes appear in such papers and the truth of this explanation is, I think, strongly borne out by the general circumstances of the case, because I can find nothing elsewhere either in probability, or in the events which admittedly happened, to show that the mamlatdar did make the attachments for the current year's assessment and not for the arrears. These arrears undoubtedly existed. There had undoubtedly been previous correspondence regarding their recovery. They have not been recovered, and in a case like the present where the mamlatdar rightly or wrongly had come to believe that there was contumacy in refusing to pay the proper current year's demand, it is very likely that he would inquire whether there were past arrears also, and finding that there were past arrears, and also believing it to be necessary, as his reports show, that an example should be made of those of the khatedars that he believed to be most contumacious, he would be very likely to deal with these past arrears.

Then we find one of the witnesses for the plaintiff, a witness who is closely identified with the plaintiff's side in this matter, says that on 20th March the past arrears were demanded (Ex. 56). I think therefore that the trial Judge was right in arriving at the conclusion that the attachment was made on account of past arrears and not on account of the current year's assessment. It is established, then, that the attachment of the plaintiff's ornaments was for the purpose of recovering from him arrears of revenue for past years, not for the assessment of the then current year. That being so we have to consider whether the mamlatdar had lawful authority to recover those arrears by such attachment. First, I will assume that the provisions of

the Land Revenue Code applied. Ss. 150 and 154 give the power to attach in such a case and the attachment can be made without notice. The power can be delegated to a mamlatdar (S. 12). Even if there was no general delegation, yet the correspondence about the recovery of the arrears (Exs. 52, 78, 61-A, 88, 89 and 68), I think, probably implies a special delegation in regard to the village of Moyad-vas-Rupaji. Moreover the mamlatdar was acting as a subordinate of a guardian of the estate appointed by the District Judge under the Guardians and Wards Act, so the guardian would have a general power to delegate his functions. I see no good reason to suppose that a delegation by the guardian to the mamlatdar to attach movables would be unlawful.

If, therefore, the guardian had the power I find no good reason to suppose either that he could not or did not delegate the power. But I do not find affirmatively on these points, we do not know enough about the case for a positive finding. We do not know even who the guardian was, whether the Collector or the Talukdari Settlement Officer; we do not know what arrangements he made, what orders he gave about the management of the property. I can only say that the mamlatdar is not shown to have been without the delegated power to attach and the circumstances of the case and the correspondence about the arrears do show that both he and his superior thought he had the power. That is enough for my present purpose. So far I have assumed that the provisions of the Land Revenue Code apply. The same reasoning holds good if S. 111 of that Code as modified by S. 33, Bombay Act 6 of 1888 applies. This is a case of a talukdar's estate coming under the temporary management of a Government Officer and the officer would be empowered to "conduct the revenue management under the rules for the management of unalienated lands not comprised within a talukdar's estate."

Whatever this latter phrase may mean, whether the provisions of the Code or some set of rules, there would doubtless be power to attach for the recovery of arrears. So here again we find it cannot be said positively that there was not power to attach or that the power had not been delegated to the mamlat-

dar and it can positively be said that the mamlatdar and his superiors supposed he had the power. If they were wrong then they made a mistake as to the law, but the law is far from simple and the circumstances to which it was to be applied were complicated. I cannot doubt that the mistake, if any, was a bona fide mistake and that it was made in the pursuance of the provisions of the law. The law is there and does contemplate attachment by a mamlatdar in certain cases. It may be that the mamlatdar erroneously pursued the law which in this case is somewhat elusive: but if he did, his conduct is assuredly covered by the provisions of S. 6, Revenue Jurisdiction Act (10 of 1876), and the mamlatdar is not liable in damages. But it is urged that all this is beside the point, because the mamlatdar's powers were delegated to him by a guardian duly appointed and the guardianship had come to an end on the minor talukdar attaining majority (S. 41, Guardians and Wards Act). No doubt the guardianship had ceased some time prior to 20th March 1911, the date of the occurrences with which we are concerned. Nevertheless the temporary management of the talukdar's estate in fact continued and unless that temporary management was unlawful, it would be a temporary management such as is contemplated by S. 33, Bombay Act 6 of 1888, and so the reasoning set out above would still hold good. Now, was this management unlawful? It is not shown to be. We do not know why the estate was not handed over to the talukdar, for that point has not been gone into. But we do know that some time later the talukdar formally asked the management of the estate by the Government Officer should continue and that it was then formally continued. That being so, we cannot assume that the informal continuance of the management was without the talukdar's consent. In other words, there is no good reason to suppose the management was wrongful whereas there is some reason to suppose it was not, I find nothing therefore, in this argument. The case of the seizure of the plaintiff's account-books is different. The mamlatdar does not pretend he attached the books for arrears of revenue. His account is this:

"I could see that there was more than enough property to attach. But I thought to myself that I should not spoil any of his goods. So I advised him not to put me to the necessity of doing it and asked him to produce the money under protest if he liked. Then he went inside his house and brought to me two account-books and told me that he had no money with him in cash and that he had to bring Rs. 35 from Prantij to keep him going. Then I told him to give an ornament as he appeared to be a well-to-do man. So he went into the parsal and brought out a key out of a niche in that wall. Then he offered me the key and asked me to open his box; I declined and asked him to do so. Then he opened the box and took out a bundle of clothes and offered it to me. I declined. Then he opened a secret drawer in the box and gave me another bundle of ornaments in which there were about four ornaments (some of silver). I handed it over to my karkun and asked him to take it to the chowra and keep in charge after calling a chowksey and getting the ornaments weighed. At Dalu's house I noticed that his account-books were bulky and I asked him there as to whether he was paying any assessment. He said 'No'. So I took the books with me; at that time the list of income-tax was under preparation. It was published on 1st April 1913. My karkun wrote out a receipt for the books: Dalu signed it. Mr. Himatlal interfered and told Dalu that the receipt was improper as it stated that the books were 'produced' by him and not 'taken away' by me. So I told him that as he was not engaged in that case he should not interfere. Daluchand, at once left off the books there and went away. I had not abused any one at this time either. I had not issued on him a notice under the Income-tax Act. He did not protest to my taking away the books."

I agree therefore with the trial Judge that the mamlatdar took the account-books for income-tax purposes. The trial Judge writes:

"Now, the evidence in this case satisfies me that the mamlatdar demanded from the plaintiff his account-books, threatening him that he had been enjoying exemption from income-tax dishonestly. And the the plaintiff thereupon handed over the books to him, without a protest. I do not think I can call this removal an attachment or seizure without the consent of the plaintiff. The mamlatdar wanted the books for lawful purposes and the plaintiff allowed the removal without a protest. The removal was thus also neither illegal nor wrongful."

I do not agree here with the trial Judge. I hold on the mamlatdar's own testimony and the admitted circumstances that the plaintiff did not willingly allow the mamlatdar to take away the books and that the taking was against his consent. How can it have been otherwise? The whole proceeding must have been intensely irritating to the plaintiff; he was unwilling to submit to anything and from that moment to this has vigorously maintained that the mamlatdar acted illegally and op-

pressively. It seems to me to be a perfectly clear case of seizure of the books by the mamlatdar against the will and in spite of the protests of the plaintiff. That being so, the seizure was unauthorized and wrongful. The Income-tax Act does not contemplate such a thing. The view of the trial Judge is expressed in para. 30 of his judgment. He finds there was no protest on the part of the plaintiff. I find there was a protest and opposition to the seizure. I do not say the mamlatdar acted absurdly, but that there is no law which in such circumstances or in any circumstances like them empowers a mamlatdar to make such a seizure. He was not pursuing the law for there was no such law to pursue; if he was pursuing anything it was a figment of his own imagination. The matter here seems to me to be quite different from that of the attachment and I cannot hold that the mamlatdar's conduct here is covered by S. 6, Revenue Jurisdiction Act. But I do not think the case is one for punitive damages and the actual damages were trivial, for the books were not long detained. I would award Rs. 5 as damages and allow the plaintiff his costs throughout, to that extent allowing the claim.

Scott, C. J.—I concur in the conclusion arrived at by my learned brother: but I have a few words to add on the question of the authority of the mamlatdar to distrain movable property of the plaintiff under S. 154 of the Code. In my opinion the mamlatdar was authorized, because he was invested with the power of making attachment of movables by delegation from the Collector of Ahmedabad under S. 12, Land Revenue Code, and the Ahmedabad Collector's memorandum of 6th November 1903, quoted by the learned Judge and not disputed by the appellant's pleader. The mamlatdar then had authority, from 1903 onwards, the Collector's authority and that of his assistant, the Talukdari Settlement Officer, arising from S. 33, Talukdars Act, so long as the estate continued under the management of Government Officers. The point urged in appeal is that the Collector's management when the arrears became due was as guardian of the minor talukdar and that the talukdar having attained majority before the occurrences complained of, there was no de jure management by the Collector at that

time. In my opinion however the authority to manage under the Government Resolution No. 5533 of 8th June 1911 issued on the application of the talukdar of an earlier date under S. 28, Gujarat Talukdars Act (Bombay Act 6 of 1888) prima facie related to the period of five years from the date from which the management by Government Officers could only be justified by reference to S. 28 of the last-mentioned Act. The de facto management of the Government Officers continued uninterruptedly, notwithstanding the event of the talukdar attaining majority and the successful request of the talukdar, when made, amounted to a ratification of and authority for their management from the date of his attaining majority.

G.P./R.K.

*Decree varied.***A. I. R. 1916 Bombay 294**

MACLEOD, J.

Indian Specie Bank, Ltd.—Plaintiff.

v.

Nagindas Hurjirandas Nanavati — Defendant.

Original Civil Suit No. 47 of 1915, Decided on 8th August 1916.

Negotiable Instruments Act (1882), S. 76
—Acceptor of bill of exchange is entitled to set off on due date as against bill any amount due to him by payee — Tender of balance due after set off — Drawer is discharged who till such tender is made is surety to extent of balance.

The acceptor of a bill of exchange is entitled to set off on the due date as against the bill any amount due to him by the payee. On tender of any balance due by the acceptor after such set-off, the drawer is discharged from liability but till such tender is made, his liability continues as the liability of a surety but only for the balance due after the set-off. [P 295 C 2]

Even in the absence of a tender, the drawer is entitled to the benefit of a set-off existing in favour of the principal debtor as against the creditor, and the latter cannot enforce liability for the whole amount on a notice of dishonour for non-payment on the due date. In spite of dishonour the drawer remains a surety and will always remain a surety, and a surety will always be discharged as soon as the principal debtor acts in such a way as to discharge himself from the principal liability. [P 296 C 1]

Defendant drew a bill of exchange on 31st July 1913 for Rs. 10,000 on *M* payable to the plaintiff bank 12 months after date. *M* duly accepted the bill. The amount not having been paid on the due date, i. e. 3rd August 1914, the bank treated it as dishonoured and gave notice of dishonour to defendant on 4th August 1914. The bank went into liquidation on 23rd November 1913. On 29th August 1914, *M* tendered a sum of Rs. 2,000 to the plaintiff bank after setting off Rs. 8,000 due to him by the bank.

The plaintiff declined to accept the tender and sued defendant for the full amount, Rs. 10,000. *M* was joined as defendant on a third party notice, and he paid the balance into Court:

Held: (1) that *M* was entitled to the set-off and the defendant was entitled to the benefit of it; (2) that defendant's liability was running from 3rd August 1914 to 29th August 1914, but was discharged after tender of the balance due by *M* on the latter date; (3) that the plaintiff was not entitled to enforce the whole claim on the defendant as from the date of dishonour; (4) that even without the tender, defendant's liability was only that of a surety and he was entitled to claim any equitable set-off in favour of *M*. [P 295 C 2; P 296 C 1]

Jadine and Campbell--for Plaintiff.

Setalvad and Strangman--for Defendant.

Judgment.—This is a summary suit filed by the Indian Specie Bank (in liquidation) by its liquidator against Nagindas Hurjivandas Nanavati, who, on 31st July 1913, drew a bill of exchange for Rs. 10,000 on Manganlal Motilal payable to the Indian Specie Bank or order at their office in Bombay 12 months after date. On 10th August 1913, the bill was accepted by Manganlal Motilal. The bill fell due on 3rd August 1914, and as it was payable at the bank and the acceptor did not attend to satisfy his obligations on the bill, it became thereby dishonoured. On 4th August notice of dishonour was given to the drawer. The defendant applied for leave to defend the suit and, in support of his application, filed an affidavit on 23rd February 1916. He alleged that the amount due by the acceptor had been duly tendered to the plaintiff but it had not been accepted and he claimed to be entitled to bring in Manganlal Motilal as third party. On 25th February an order was made giving the defendant leave to defend and also giving him leave to serve Manganlal Motilal with a third party notice. Notice was served and when directions were asked for, an order was made on 1st April that the third party, Manganlal Motilal, be at liberty to defend the suit on condition that there should not be two sets of costs in the event of the costs being made payable by the plaintiff. It is not disputed that the acceptor did not pay what was due on his acceptance on 3rd August but, on 6th August, his solicitors wrote to the plaintiff:

"As you are aware the Specie Bank is indebted to our clients in the sum of Rs. 8,000 in

respect of two amounts, viz. Rs. 5,500 and Rs. 2,500 borrowed by the bank on their fixed deposit receipts, dated 24th and 30th September 1913 respectively, and bearing interest at 5 per cent per annum. The bank is thus indebted to our client in the total sum of Rs. 8,072-8-11, being the amount of the principal and interest up to 29th November 1913, the day on which the petition to wind up the bank was presented. On your consenting to set off the said amount of Rs. 8,072-8-11 against the said sum of Rs. 10,000 our client is ready and willing to pay off the balance, which please note."

It is also admitted that, on 29th August Messrs. Hiralal and Co., on behalf of Manganlal Motilal, tendered to the plaintiff Rs. 1,927-7-1, the balance due on the acceptance after giving credit for the amount due by the bank on the deposit receipts. Now it is admitted that the acceptance was not met on 3rd August. It is quite clear that, as between the liquidator of the bank and the acceptor, the liquidator was not entitled to claim from the acceptor the full amount of the acceptances and leave the acceptor to prove his claim on the deposit receipts in liquidation and trust to see what dividend he would get. It would be a most extraordinary state of law if such an action could be permitted on the part of a liquidator. In my opinion a liquidator is bound to allow a set-off in such a case, and therefore, if Manganlal had gone to the bank on 3rd August and tendered the difference between the amount of the acceptance and what was due on the deposit receipt, the liquidator would have been bound to accept it. It is quite true that, on 3rd August, as Manganlal did not do that, the plaintiff had recourse to the drawer, but the liability of the acceptor remained, and if he had at any time afterwards fulfilled his liability, then it must necessarily follow that the liability of the drawer, which was only the liability of a surety, would be released. I will take it that the drawer's liability was running from 3rd August to 29th August, but on the latter date the principal debtor made a good tender of what was due him on his acceptance and that tender extinguished the liability of the drawer. As a matter of fact it was not accepted by the liquidator and, in my opinion, the liquidator in refusing to accept that tender was wrong.

But assuming that the tender was not made and that the liability of the

drawer as a surety still continued, he was still entitled to the benefit of any set-off which existed in favour of the principal debtor as against the creditor and therefore, when the difference was paid into Court with the written statement after the third party notice, he would still be entitled to claim relief on payment of that difference. However, not only was a good tender made by the principal debtor on 29th August but the full amount that could possibly be recovered from the acceptor is now in Court, and therefore, it is quite clear that the liability of the drawer is gone. It is suggested that the plaintiff bank was entitled to recover the full amount from the drawer whatever the acceptor might do, but it would be most inequitable if the bank could brush aside any claim made by the acceptor and say to the drawer:

"Now that the bill is dishonoured on the due date, I am not concerned with what the acceptor may do. I am not concerned with any tender he may make. I am determined to get the money out of you on your liability as a surety and leave you to your remedy against him."

In spite of dishonour the drawer remains a surety and will always remain a surety and a surety will always be discharged as soon as the principal debtor acts in such a way as to discharge himself from the principal liability. Therefore, in my opinion, the suit must be dismissed, the plaintiff being at liberty to take the money out of Court if it is not taken already. Plaintiff to pay the third party's costs and the defendant's costs up to 1st April including costs reserved.

G.P./R.K.

Suit dismissed.

A. I. R. 1916 Bombay 296

BATCHELOR AND SHAH, JJ.

Secy. of State — Defendant — Appellant.

v.

Gulam Rasul Gayasudin Kuwari — Plaintiff—Respondent.

First Appeal No. 187 of 1913, Decided on 24th January 1916, from decision of Dist. Judge, Thana, in Suit No. 2 of 1912.

Civil P. C. (1908), S. 80 — Suit against Secretary of State — Defendant's agent threatening injury before expiry of notice—Institution of suit during currency of notice period is justified.

The object of S. 80 is to enable the Secretary of

State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice.

[P 297 C 2]

A plaintiff however will be justified in filing his suit before the expiry of the period of notice where the agents of the Secretary of State, during the currency of the notice, threaten to demolish the property which is the very subject-matter of the intended suit.

[P 297 C 1]

The right of suit, which is expressly granted by the legislature, cannot in reason be deferred until its exercise has become illusory : 35 Bom 362, *Foll.*

[P 297 C 2]

S. S. Patkar—for Appellant.

M. R. Bodas—for Respondent.

Batchelor, J.—This is an appeal by the Secretary of State who was the defendant in the original suit. That suit was brought by the plaintiff for a declaration that a piece of land forming an open space in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it. Of the three points urged in appeal by the learned Government Pleader, the first is the question of fact whether the plaintiff had proved his title. Now the evidence in favour of the plaintiff upon this point is, it is not disputed, sufficient and convincing, unless the effect of it can be removed by the consideration which formed the basis of Sir Charles Sargent's decision in *Framji Cursetji v. Goculdas Madhowji* (1), where the learned Chief Justice pointed out that in this country slight acts of user were insufficient to give a title to land by adverse possession. That however was a very different case from the one which we are now considering. For it was a case where a private plaintiff complained that his land had been encroached upon and the private defendant justified the encroachment by pleading that adverse possession had given him title to the property. Here we are dealing with the claim to a piece of land situated in a village which has not been surveyed or measured. The only evidence open to the plaintiff to establish his title would be such evidence of user as he has given, and the acts of user are, in my opinion, of a far more significant and important character than those which were before Sir Charles Sargent. I agree with the learned District Judge in thinking that the evidence adduced by the plaintiff on the

1. (1892) 16 Bom 338.

question of title proves the plaintiff's case on that point.

That being so, the second objection raised by the appellant seems to me also to fail. The objection is based upon Art. 14, Lim. Act, and S. 202, Bombay Land Revenue Code. But admittedly the order made by the Assistant Collector under S. 202, Bombay Land Revenue Code, was made without jurisdiction and was in law and in fact a nullity, if the land was—as we now hold that it was—the private property of the plaintiff. Since therefore the Assistant Collector's order was a nullity, it was not incumbent on the plaintiff, suing for this declaration, to pray also that that order should be set aside: see the case of *Surannanna Devappa Hedge v. Secy. of State* (2) and the observations of Batty, J., in the case of *Balvant Ramchandra v. Secy. of State* (3). There remains only the third point taken on behalf of the appellant by the learned Government Pleader, and that point turns upon S. 80, Civil P. C., which requires a plaintiff suing the Secretary of State to give two months' notice before the suit is instituted. The plaintiff gave the notice required on 2nd May 1912. But, on 19th June 1912, i. e., before the expiry of the two months, he filed this present suit. At first sight therefore the suit would seem to be bad for want of due legal notice.

But the plaintiff justifies his suit on the ground that during the currency of his notice he was compelled to precipitate the institution of his suit by reason of the fact that the defendant's agent, the mamlatdar, threatened to demolish the property which was the subject-matter of the suit. It is not denied in appeal that, as a matter of fact, the mamlatdar did threaten this action. In that state of the facts I think that the suit is not bad under S. 80. I agree with what was said in *Secy. of State v. Kalekhan* (4) to this extent that the words of S. 80 countenance no distinction based only on the class or character of the suit filed, when it is filed, as here, against the Secretary of State. But, in my judgment, the section is inapplicable on the present facts not by reason of the particular character of the suit, but by

reason of circumstances which would equally apply to any kind of suit. For, following Cunningham, J.'s exposition of S. 424 of the Code of 1877 which corresponds with our present S. 80, I am of opinion, as I said in *Naginlal Chunilal v. Official Assignee* (5), that the object of S. 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice.

If, then, that is the object of the section which in terms allows a private litigant to sue the Secretary of State for redress, it appears to me undesirable to extend the meaning and scope of the section so as to produce this result that although a private person is empowered to sue the Secretary of State after two months' notice, yet the Secretary of State's agent during the currency of the two months is to be permitted to destroy the material object which is the very subject-matter of the suit. In my opinion to place this construction upon S. 80 is to attribute to the legislature an inconsistency which ought to be avoided. In reading the section, as I now read it, it appears to me that full effect is given to its object and intent, while the opposite construction leads directly to inconsistency and injustice. It is small gain to a private person to enact that he may have redress against a defendant after two months' notice if, during the currency of the two months, the defendant is allowed to make redress impossible. The right of suit, which is expressly granted by the legislature, cannot in reason be deferred until its exercise has become illusory. This view has the support of the observations recorded by Chandavarkar and Heaton, JJ., in the case of *Secy. of State v. Gajanan Krishna Rao* (6).

No other point has been taken in this appeal by the appellant, and I am therefore of opinion that the appeal fails and should be dismissed with costs.

Shah, J.—I am of the same opinion.

G.P./R.K.

Appeal dismissed.

2. (1900) 24 Bom 435.

3. (1905) 29 Bom 480.

4. AIR 1914 Mad 502=37 Mad 113=16 I C 947.

5. (1913) 37 Bom 243=17 I C 876.

6. (1911) 35 Bom 362=10 I C 639.

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SCOTT C. J., AND HEATON, J.

Abdullabhai Lalji and another —
Plaintiffs—Appellants.

v.

Executive Committee, Aden — Defen-
dants—Respondents.Civil Ref. No. 9 of 1915, Decided on
23rd February 1916, by Political Resi-
dent, Aden.**Aden Settlement Regulation (1900), —**
Rules of assessment and collection of taxes
R. 12—Construction of.

It is doubtful if R. 12 of the rules for assess-
ment and collection of taxes made under the
Aden Settlement Regulation makes the decision
of the Judge of the Resident's Court in a rating
appeal final, and assuming that it does make the
decision final it would amount to the creation
of a jurisdiction which the legislature withheld,
and thus would be ultra vires. [P 299 C 2]

*Inveriaty, Setalvad, Mulla and Ratan-
lal Ranchhoddas*—for Appellants.*Jardine and Strangman* — for Res-
pondents.

Scott, C. J.—This a reference under
S. 8 Aden Act 2 of 1864 for the decision
by this Court of the following questions:
1. Whether the lower Court (i. e., of the
Assistant Resident) did not act irregu-
larly and illegally in declining to hear
the plaintiffs' case as a whole and rais-
ing a certain preliminary issue and de-
ciding the same without taking any evi-
dence as to the merits of the case : 2.
whether the decision of the lower Court
on the said issue was not erroneous.
And : 3. whether the lower Court was
not wrong in dismissing the plaintiffs'
suit. The nature of the plaintiffs' suit
and the circumstances under which the
preliminary issue, the subject of the re-
ference, was raised are stated in the
judgment of the Assistant Resident as
follows :

"The plaintiffs, in 1909, obtained a lease from
Government of certain lands in the Sheikh
Othman District of Aden for the purpose of con-
structing salt works thereon and the manufac-
ture of salt therein. The plaintiffs pay a rent
of Rs. 7,000 per annum for this land, plus a
royalty of eight annas per ton on all salt ex-
ported by them. The defendants, the Executive
Committee of the Aden Settlement, constitute
the Municipal authority of the Aden Settle-
ment, within the area of which is comprised the
land upon which the plaintiffs' salt works are
situated. As stated in the plaint, the Political
Resident at Aden, in exercise of powers conferred
upon him by the Aden Settlement Regulation
(No. 7 of 1900), had published two Notifications,
dated 26th March 1909, levying certain taxes and
laying down rules for the assessment and collec-
tion thereof. Included among the taxes so levied
were a House and Property Tax and a General

Sanitary Tax, both taxes to be assessed on the
rateable value of the property taxed. By these
Notifications, the defendants were charged with
the duty of assessing and collecting the said
taxes in accordance with the rules therein
embodied. The defendants, acting on the powers
thus conferred on them, fixed the rateable value
of the aforesaid leasehold lands of the plaintiffs
at Rs. 7,000, that being the amount payable by
the plaintiffs as annual rent for the lands. This
was done in the year 1909, when the salt works
had only just begun to be constructed and no
salt had as yet been produced. In the year 1911,
when production had commenced, the defen-
dants adopted a new mode of assessment, and
fixed the rateable value of the property at one-
half the value of the salt exported by plaintiffs
during the year, less ten per cent."

"The plaintiffs state that they protested against
this new mode of assessment, but their protest
was overruled by defendants, who continued in
the following years to assess the taxes on the
new basis in spite of protests from plaintiffs on
each occasion. The plaintiffs urge that this new
method of assessment is wrong in principle and
oppressive, as well as being illegal and unautho-
rized, and they ask for a declaration of the Court
to that effect. They ask further for a declara-
tion that the correct method of assessing the
taxes is to make the fixed rental Rs. 7,000 or at
most such sum plus the royalty payable by plain-
tiffs on salt exported as the rateable value of the
lands and to assess the taxes on such rateable
value. They ask finally for a decree for the re-
fund of the excess sums over the amount legally
payable recovered by defendants during the three
years 1911-1914. Now the first point to be
noted is that in their plaint the plaintiffs make
no mention whatever of the fact that in three
successive years they made three appeals to the
Court of the Resident, in the manner provided
in the rules, against the defendants' decisions
of which they complain, and that all these ap-
peals were rejected by the Court. This is a fact
to which great importance is, not unnaturally,
attached by the defendants, who maintain that
these decisions in appeal are final and that this
Court cannot interfere. In the circumstances
it has been necessary to frame a preliminary
issue : Whether this Court has jurisdiction to
interfere with the assessment fixed by the de-
fendants, and confirmed by the appellate autho-
rity ? If the decision on this issue be found in
the negative, this Court can have no option but
to dismiss the suit".

The plaintiffs inter alia contended
that the rules providing for appeals
against over-assessment were not passed
by the Legislative Council and there-
fore have not for the purposes of the
present case the force of law. The Aden
Settlement Regulation, 1900, made under
the Government of India Act, 1870 (33
Vic. C. 3), provides for the establishment
of an Executive Committee for the Muni-
cipal Government of Aden to be appoint-
ed and controlled by the Resident which
shall have such authority, discharge
such functions and exercise such powers

within the area to which the Regulation extends as the Resident may by any rules under the Regulation direct. By Cl. 13 the Resident is authorized, subject to the previous sanction of the Local Government, to make rules to provide for certain specified matters which include

"the assessment and collection of any toll, cess, tax or other impost imposed under the regulation."

By Cl. 11 the power to impose such tolls, cesses, taxes and other imposts as are necessary for the purposes of the regulation is vested in the Resident, who may fix the taxes and modes of levying or recovering the same. On 26th March 1909, the Resident imposed inter alia a House and Property Tax and General Sanitary Tax, and on the same day issued rules purporting to be for the assessment and collection of the House and Property Tax or General Sanitary Tax. They provided inter alia for the preparation of an assessment list containing "the annual letting value or other valuation on which the property is assessed", for complaints to the Executive Committee where any property was for the first time being entered in the list or in which the entered rateable value has been increased, and for appeals against any rateable value to the Judge of the Resident's Court. R. 12 provides that after appeals, if any, are decided and the results noted in the assessment list, all rateable values so entered in the list shall be final subject to such action as may be necessary under Rr. 17 and 18 to amend the list from time to time.

It may be observed that the rules contain no rules for assessment but only directions for the entries to be made in the assessment book after the property has been assessed. This point can be made clear by reference to the City of Bombay Municipal Act (Bombay Act 3 of 1888), which is expressly referred to in the Notification of Taxes of 29th March 1909. Ss. 146 to 153, Bombay Act provide for the persons to be made liable. These sections are adopted by reference in the Notification of Taxes but Ss. 154 and 155, which provide for the mode of assessment, have no counterpart in either the rules or the Notification of the Resident. The provision of R. 12 regarding the finality of the rateable

value is apparently taken from the first and the last lines of S. 219 (1) Bombay Act, but there is no counterpart to the Bombay provision that the decision of the Judge in an appeal against such value shall be final.

It is however assumed by the Assistant Resident's judgment that the provision that the rateable value shall be final, is equivalent to a provision that the decision of the Judge in the rating appeal shall be final. If this was the intention it is curious that the Bombay Government, whose previous sanction to the rules was necessary, should have sanctioned the omission of the provision that the decision of the Judge in a rating appeal shall be final. It is curious for the reason that the corresponding provision in S. 219, Bombay Municipal Act, was found to require validation by an Act of the Governor-General, viz., Act 12 of 1888. It is just as probable that the provision that the decision should be final was omitted in order not to prevent suits for refund of disputed rates in the Court of the Resident, in which suits a case might be stated under the Aden Act for the decision of the High Court as they can be stated by the rating appeal Court in Bombay under the Act 12 of 1888, or because there was a doubt as to the legality of limiting by rules the ordinary jurisdiction of the Resident's Court. We will however dispose of the reference now before us on the assumption that the R. 12 is intended to make the decision of the Judge of the Resident's Court in a rating appeal final. On this assumption we think the rule is ultra vires.

It is well established that a distinct unequivocal enactment is required for the purpose of either adding to or taking away the jurisdiction of a Court. The Resident's Court had already jurisdiction under the Aden Act of 1864 to hear and determine all cases of whatever value. The R. 12 read as it has been by the Assistant Resident amounts, to use the words of Lord Watson in *King v. Henderson* (1), to "the creation of a jurisdiction which the legislature withheld." It would, if valid, force the aggrieved rate-payer to accept a final decision by a procedure in which appeal by way of case stated to this Court would not be open. No one disputes that such

1. (1898) A C 720 (PC).

a result may be obtained by legislative enactment by a competent authority, but authority to achieve such a result by the subordinate legislation of rules cannot be implied, for the presumption is the other way. We are therefore of opinion that there is no valid objection to the trial on its merits of the suit instituted by the plaintiffs. We answer the questions put as follows : (1) in the affirmative : (2) the decision of the lower Court was erroneous : (3) the lower Court was wrong in dismissing the plaintiff's suit. Costs consequent on the reference to be costs in the suit.

G.P./R.K. *Order accordingly.*

A. I. R. 1916 Bombay 300

SCOTT, C. J. AND SHAH, J.

Jayawant Jivanrao Deshpande —
Plaintiff—Appellant.

v.

Ramchandra Narayan Joshi—Defendant—Respondent.

Second Appeal No. 309 of 1914, Decided on 30th September 1915, from decision of 1st Class Sub-Judge, Sholapur, in Appeal No. 61 of 1912.

Limitation Act (1908), Arts. 140 and 141—Hindu widow not heard of since 1870—Suit by reversioner since 1911—Plaintiff must prove that his suit is within 12 years from actual death of widow—Evidence Act (1872), S. 108.

A Hindu widow disappeared in 1865 and was not heard of since 1870. In 1911 the plaintiff sued as a reversionary heir:

Held: that it lay on the plaintiff to show affirmatively that he had brought the suit within 12 years from the actual death of the widow.

[P 302 C 1]

Article 141 is merely an extension of Art. 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each Article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff [suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within 12 years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of S. 108.

[P 301 C 1]

H. C. Coyajee and N. V. Gokhale—for Appellant.

Campbell and K. N. Koyajee—for Respondent.

Scott, C. J.—This suit was brought by the plaintiff, claiming to be the reversioner of one Shamrao, the original owner of the property, for redemption of a mortgage or for possession of the

property. Shamrao, the original owner, had one son Kakaji who predeceased him but left a widow Rangubai. Rangubai survived Shamrao, and she during her life enjoyed the property. She passed a mortgage-bond in favour of Narayan, father of defendant 1, on 21st January 1860. In 1865 she disappeared and she has not been heard of probably since 1865, or certainly since 1870, when she is alleged to have received a cash allowance. In 1861 a suit was filed against her by Bodhraj on a money-bond passed by Rangubai to him on 18th February 1860, and Bodhraj obtained a decree on 9th December 1862. The property was sold in execution of that decree, and Bodhraj became the purchaser at the execution sale in February 1868. In the same year Narayan, the father of defendant 1, filed a suit against Bodhraj on the mortgage-bond, and eventually a decree was passed in the appellate Court in favour of Narayan establishing his right as mortgagee and ordering the defendant Bodhraj to pay Rs. 882 to Narayan in satisfaction of the mortgage-debt within six months and declaring that if the payment was not made within the time specified, Narayan would become the absolute owner and Bodhraj would be foreclosed. That decree was passed on 20th September 1870, yet notwithstanding the decree the plaintiff sues as the reversionary heir of Shamrao for redemption of the mortgage, or if it be held that the mortgage is not subsisting, for ejectment of the defendants.

The first Court decided the case in favour of the plaintiff, on the ground that under S. 108, Evidence Act, the Court must presume that Rangubai died at the time of suit, notwithstanding that she had not been heard of, at all events since 1870, and that therefore the plaintiff's claim was in time and he was entitled to recover on the death of Rangubai as the reversioner. From that decision an appeal was preferred to the lower appellate Court which reversed the decree, and we have now to decide whether the decision of the lower appellate Court is correct. Dealing first with the position under the mortgage-bond, under certain circumstances the mortgage might have been binding upon the reversioners, but it is found as a fact that the mortgage was not passed by

Rangubai for any legal necessity or for justifying cause. It therefore bound only the interest of Rangubai in the property. The mortgage by reason of the foreclosure decree on default by Bodhraj in 1870 came to an end, and the mortgagee became entitled as against Rangubai to the position of an absolute owner of the estate in the mortgaged property. There is therefore no mortgage in existence which can be redeemed and the only question is whether the plaintiff can succeed in his suit as a reversioner upon the death of Rangubai having regard to the provisions of Art. 141 Lim. Act.

Now his suit assumes the death of Rangubai, otherwise he could not claim to be a reversioner. But the learned Judge of the trial Court has held that Rangubai's death occurred at the time when the suit was filed. That assumes that the plaintiff is entitled to rely upon the absence of news of Rangubai as proof of a fact the onus of proving which lies upon him, namely, that he sues which 12 years of the estate opening for the benefit of reversioners. Art. 141 Lim. Act, is merely an extension of Art. 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within 12 years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of S. 108, Evidence Act. The exact point for the purpose of Art. 140, and also, in our opinion, of Art. 141, has been decided many years ago in England soon after the passing of the English Law of Limitation regarding Real Property in *Nepean v. Doe d. Knight* (1). The facts there were that one Matthew Knight, a previous owner of the property, was last heard of in May 1807, and the declaration in the action for ejectment which was brought by the reversioner or remainderman was dated

18th January 1834. The doctrine obtaining in England with regard to presumption of death was that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years. Now if seven years be added to May 1807 when Matthew Knight was last heard of, it would bring us to May 1814, within 20 years of the date of the declaration in the action. 20 years was the period within which under the Real Property Limitation Act the plaintiff must bring his suit in ejectment. It was however held that there was no presumption that Matthew Knight had died on the last day of those seven years or on any particular day within those seven years, and that the plaintiff must establish by affirmative proof that he brought his suit within 20 years of his lessor's estate falling into possession. Lord Denman delivering the judgment of the Court said:

"The doctrine laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of;"

and later he continues:

"It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence of Matthew Knight and his not having been heard of for seven years, whence arises at the end of those seven years another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within 20 years after his right of entry accrued, that is after the actual death of Matthew Knight. Now when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died."

It was therefore held that the plaintiff had not succeeded in discharging the onus which was upon him, although the declaration was within 20 years of the expiry of the seven years from the last news of the death of Matthew Knight. That case appears to us to be directly in point. The decision of the appeal Court

1. (1837) 2 M & W 894=7 L J Ex 335.

In re, Phene's Trusts (2) only throws doubt upon the statement of Lord Denman that the law presumes that a person shown to be alive at a given time remains alive until the contrary is shown on the ground that if the man could only be presumed to be dead after seven years from the date of the last news of him, a presumption of life would carry his existence up to the end of the seven years, as was held (as Giffard, L. J., thought wrongly) by Vice-Chancellor Malins in *In re Benham's Trust* (3). There is more to be said for the view of Malins, V. C., where the law is as stated in Ss. 107 and 108, Evidence Act. The criticism of Giffard, L. J., does not, however, affect the direct application of the judgment in *Nepean v. Deo d. Knight* (1) to the case now before us, and we must hold that it lies on the plaintiff to show affirmatively that he has brought his suit within 12 years from the actual death of Rangubai. In so holding we do not run counter to any Indian decision upon S. 108, Evidence Act.

The plaintiff has not discharged the onus which lies upon him and therefore his claim was rightly rejected by the lower appellate Court. We affirm the decree and dismiss the appeal with costs.

G.P./R.K.

Decree affirmed.

2. (1870) 5 Ch 139=39 L J Ch 316.

3. (1867) 4 Eq. 416=36 L J Ch 502.

A. I. R. 1916 Bombay 302

BATCHELOR AND SHAH, JJ.

Tangya Fala—Plaintiff—Appellant.

v.

Trimbak Daga and another—Defendants—Respondents.

First Appeal No. 29 of 1915, Decided on 25th July 1916, from decision of First Class Sub-Judge, Dhulia, in Civil Suit No. 302 of 1912.

(a) Contract Act (1872), S. 70—Question for decision under S. 70 is question of fact—Civil P. C. (1908), S. 100.

The question which Courts have to decide under S. 70, Contract Act, is almost entirely, if not entirely, a question of fact. [P 304 C 1]

(b) Contract Act (1872), S. 70—Non-gratuitous act done without intention to benefit person alleged to be benefited—Right to compensation does not arise when act is done without knowledge of person benefited—Stranger paying off mortgage presumably does not intend to discharge mortgage and is subrogated to position of mortgagee though

payment may have been made without consent of mortgagor—T. P. Act (1882), S. 95.

No right to compensation under section arises when there was no intention to benefit the person who is alleged to have enjoyed the benefit of the non-gratuitous act and when the act was done without the consent or knowledge of such person : 38 Cal 1, Ref. [P 304 C 1]

The doctrine, which is applicable to India, is that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. The mortgagor's consent to the payment is not necessary to entitle the person paying to be subrogated to the position of the mortgagee for the mortgagor's position is in no wise substantially altered, except that, instead of owing money to one creditor, he owes it to another : *Butler v. Rice*, (1910) 2 Ch 277 and 10 Cal 1035, Ref. [P 304 C 2]

One A obtained a mortgage decree against defendant 1 and, in execution, applied for sale of the hypotheca. Defendant 2, who held a simple money decree against defendant 1, meantime brought the property to sale in execution of his decree and purchased it himself. About two years afterwards, the property was again put up for sale by the Collector at the instance of the mortgagee. Defendant 1 borrowed Rs. 2,463 from plaintiff, paid off the mortgage amount and averted the sale. He then executed a sale-deed of the property to the plaintiff for the consideration already advanced, plus Rs. 1,500 which he had received from the plaintiff from time to time. The plaintiff, who was already in possession under a ten years' lease from defendant 1, was ejected by defendant 2 in a suit filed by him for recovery of possession. Plaintiff brought the present suit for recovery of Rs. 4,000, the consideration for the sale-deed, from defendant 1 and prayed that Rs. 2,463 thereof, which was applied in discharge of the mortgage, be recovered from defendant 2 personally and by sale of the mortgaged land. The Subordinate Judge decreed all but a small portion of the claim against defendant 1 and dismissed the claim against the second, holding that defendant 1 had no saleable interest in the land when he conveyed it to the plaintiff. On appeal to the High Court, it was urged for the plaintiff that defendant 2 was liable under S. 70, Contract Act, or in the alternative by virtue of plaintiff's being subrogated to the rights of the original mortgagee :

Held : (1) that plaintiff was not entitled to compensation under S. 70, Contract Act, as the payment was not made by him to benefit defendant 2, nor with his knowledge or consent ;

[P 304 C 1]

(2) that plaintiff stood in the mortgagee's shoes and was entitled to enforce the claim for sale of the property for the amount of the mortgage. [P 304 C 1]

Per Batchelor, J.—The plaintiff, in making the payment behind the back of defendant 2, was depriving defendant 2 of an option which the law allowed him to exercise. For, to defendant 2 it was open either to pay off the mortgage or to stand by and let the property be sold. When therefore the plaintiff, without reference to defendant 2, intruded himself in order to make the payment without defendant 2's knowledge it cannot be said that such payment was made for defendant 2. [P 304 C 1]

Per *Shah, J.*—The mortgage decree was against defendant 1 and was being executed against him at the time. He was therefore clearly interested in satisfying the decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so, and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage decree to the mortgagee at the instance of defendant 1. [P 305 C 1]

(c) **Transfer of Property Act (1882), S. 95**—**Doctrine of subrogation in English Law is not inconsistent with Act.**

The equitable doctrine of the subrogation of a mortgage in English law, though not in terms contained in the Act, is not inconsistent with any provision of that Act. [P 305 C 1]

G. S. Rao—for Appellant.

M. V. Bhat—for Respondents.

Batchelor, J.—In 1893, the property in suit and certain other properties were mortgaged by their owner Daga Lahnu to one Atmaram to secure a sum of Rs. 2,250. In 1904, the mortgagee, Atmaram, brought a suit on his mortgage and obtained a decree for payment of Rs. 2247 and costs within six months or in default, the sale of the property. On 12th June 1905, Atmaram as decree-holder presented an application for sale of the mortgaged property. This application was transferred for execution to the Collector. On 27th June 1905, the present defendant 2, in execution of a money decree which he had obtained against Daga, brought the property to sale and purchased it himself. On 13th April 1907, in execution of Atmaram's decree on the mortgage, the Collector put the property to sale. Thereupon, Daga Lahnu, who was defendant 1 in the suit, borrowed a sum of Rs. 2,463 from the plaintiff in order to pay off Atmaram's decretal amount, and, with the money so borrowed from the plaintiff, Atmaram's decree was, in fact, satisfied and the threatened sale was averted. On 17th December 1907, Daga executed a sale-deed in the plaintiff's favour in regard to the property now in suit, namely a moiety of Survey No. 172. The total consideration of the sale-deed is Rupees 4,000, made up of Rs. 2,463 advanced in April 1907 by the plaintiff together with other sums lent to Daga personally. In 1905, the plaintiff went into possession of the lands on a 10 years' lease from Daga, but in 1908 he was ejected from possession on a suit filed by defendant 2 for the recovery of possession. Thereafter the plaintiff brought the present

suit in which he claimed to recover Rs. 4,000, the consideration of the sale-deed, from defendant 1, while as against defendant 2 the claim was that since Atmaram's mortgage had been paid off with the plaintiff's moneys, the plaintiff should be decreed to stand in the shoes of the mortgagee, Atmaram, with the result that his advance of Rs. 2,463 should be recoverable by the sale of the mortgaged land in the hands of defendant 2.

There was also a prayer that the sum should be decreed from defendant 2 personally. The learned Judge of the lower Court has given the plaintiff a decree for Rs. 3,113 against defendant 1 only, and the claim against defendant 2 has been rejected. In this appeal Mr. Rao, on behalf of the plaintiff-appellant, raises two contentions, the first being that under S. 70, Contract Act, defendant 2 is personally liable to repay to the plaintiff Rs. 2,463 advanced by the plaintiff to defendant 1. S. 70, Contract Act, makes provision for the compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do gratuitously, and that the other person shall enjoy benefit. I will assume in the plaintiff's favour that these three conditions are, in the present case, satisfied. There remains the condition expressed in the first words of the section, which are "where a person lawfully does anything for another person."

The plaintiff's case here is that the payment of Atmaram's mortgage was the thing done by him for defendant 2. I am of opinion however that that claim is not substantiated. There is no doubt about the facts, which are that the payment was made not only without the consent, but without the knowledge, of defendant 2. On the evidence on the record I am of opinion that the object of the payment was to benefit the plaintiff himself. Moreover, while it does not appear that defendant 2 would not have paid off the mortgage himself if the matter had been brought to his attention, it does appear that the plaintiff, in making the payment behind the back of defendant 2, was depriving defendant 2 of an

option which the law allowed him to exercise. For to defendant 2 it was open either to pay off the mortgage or to stand by and let the property be sold. When therefore the plaintiff, without reference to defendant 2, intruded himself in order to make the payment without defendant 2's knowledge, I am of opinion that it cannot be said that such payment was made for defendant 2. That is the view of the learned Judge of the lower Court. As was observed Sir Lawrence Jenkins in *Suchand Ghosal v. Balaram Mardana* (*Mohendra Ghosal v. Bhuban Mardana*) (1), the question which the Courts have to decide under S. 70, Contract Act, is almost entirely, if not entirely, a question of fact. I may add that the case before us is on its facts readily distinguishable from *Suchand's* case (1), inasmuch as there the person who paid the money had an incontestable tenant's right and the payment was made for the benefit both of himself and of the other tenants who were liable under the decrees and had no alternative but to pay the decretal debts. I agree with the learned Trial Judge that upon the facts of this case the plaintiff's claim to compensation under S. 70, Contract Act is not established.

There remains Mr. Rao's second contention, which is based upon the equitable doctrine allowing a stranger who pays off a subsisting mortgage to be subrogated to the position of the mortgagee. The facts, here again, are not in dispute. The mortgage of Atmaram was paid off with the help of the plaintiff's moneys by defendant 1 and it cannot, in my opinion, be doubted that defendant 1 had an interest in paying off that mortgage. Therefore if the doctrine is made out, defendant 1 could claim to stand in the mortgagee's shoes, and if that be so, the same position would be occupied by the plaintiff, who claims through defendant 1 and whose moneys were advanced to defendant 1 precisely in order that Atmaram's mortgage should be discharged. That the legal doctrine, for which Mr. Rao contends, is established is illustrated, I think, by Warrington, J.'s decision in *Butler v. Rice* (2). There is no objection to our reference to this English

decision for the purpose of verifying a doctrine which, though not in terms contained in the Transfer of Property Act, is not inconsistent with any provision of that Act. Indeed S. 95 of the Act suggests that the doctrine was at least in part formally accepted by the Indian Legislature. Reference may also be made upon this point to the decision of their Lordships of the Judicial Committee in *Gokaldas Gopaldas v. Puranmal Premsukhdas* (3). Now *Butler v. Rice* (2) was a case where the plaintiff, Butler, upon an agreement to receive a mortgage for £ 300 advanced a sum of money to Rice in order that Rice might pay off certain mortgages of property belonging to Mrs. Rice.

The money was, accordingly paid and the mortgages were released, but all this was done without the knowledge of the mortgagor Mrs. Rice. It was contended in argument that mortgages in these cases are only kept alive where the charge is paid off at the express or implied request of the mortgagor. That argument however was rejected by Warrington, J., who observed that the statement of claim, or as we should say the plaint, proceeded on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. I pause to observe that in our own case we have not only that presumption, but the sworn testimony of the plaintiff that such was, in fact, his intention. As to the argument that Mrs. Rice's knowledge was essential, the learned Judge observed that her concurrence was immaterial inasmuch as her position was not affected, for the only alteration in her position was that instead of owing the money to one creditor, she owed it to another and in the first words of the judgment, in language which is perfectly apt to our present case, the learned Judge said that the question he had to determine was whether the mortgagor was entitled to hold the property discharged from the debt of £. 450, not one penny of which she had paid off herself, or whether the person who paid it was entitled to treat the charge as still on foot in his favour.

1. (1911) 38 Cal 1=6 1 C 810.

2. (1910) 2 Ch 277=103 L T 94.

3. (1884) 10 Cal 1035=11 I A 126.

As the learned Judge answered that question against the mortgagor, so we must answer in the present case, where the similar question is whether defendant 2 is entitled to hold this land free of an encumbrance of Rs. 2,463, not one rupee of which he has ever paid himself, but every rupee of which has come from the pockets of the plaintiff. I may add that the plaintiff's position is, if there be any difference, somewhat stronger than was Butler's position, for while Butler was a mere stranger, the plaintiff is claiming through a person with a clear interest in releasing the mortgage. On these grounds I am of opinion that Mr. Rao's second contention must be conceded and that the land in possession of defendant 2 must be held chargeable with the sum of Rs. 2,463.

In my opinion therefore we should reverse the lower Court's decree and substitute for it a decree allowing the plaintiff the sum of Rs. 2,463 to be recovered with interest at 6 per cent from the date of suit to the date of payment by the sale of one-half of Survey No. 172. Any deficiency between this sum and the total of Rs. 3,113 should be recovered from defendant 1, being made payable in annual instalments of Rs. 800 until complete satisfaction, the first such instalment to be due three months after the amount of the deficiency has been ascertained. The plaintiff must have his costs here and in the Court below. The sum, if not paid by defendant 2 within six months may be recovered by sale of the property.

Shah, J.—I agree. I desire to add a word with reference to Mr. Bhat's argument that neither the plaintiff nor defendant 1 was interested in satisfying the mortgage claim of Atmaram at the time, when the sum of Rs. 2,463 was paid by the plaintiff. It is clear that, in spite of the previous purchase by defendant 2 at a court-sale of the two survey numbers, the equity of redemption in the other property mortgaged to Atmaram was vested in defendant 1 at the time. The mortgage-decree in favour of Atmaram was against him and was being executed against him at the time. He was therefore clearly interested in satisfying Atmaram's decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his

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interest to do so; and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage-decree to Atmaram at the instance of defendant 1.

G.P./R K.

Appeal allowed.

A. I. R. 1916 Bombay 305

SHAH AND HAYWARD, JJ.

Murlidhar Narayan Gujarathi — Defendant—Appellant.

v.

Vishnudas Balmukandas — Plaintiff—Respondent.

Second Appeal No. 245 of 1914, Decided on 22nd October 1915, from decision of First Class Sub-Judge, Nasik, in Appeal No. 248 of 1912.

(a) **Civil P. C. (1908), O. 34, Rr. 4 and 5—No appeal filed against preliminary decree under O. 34, R. 5—Correctness of preliminary decree cannot be questioned in appeal from final decree under O. 34, R. 5—T. P. Act (1882), Ss. 88 and 89.**

Like a decree under S. 88, T. P. Act, a preliminary decree under O. 34, R. 4, is a decree which must be appealed from if the party concerned feels aggrieved by it. If it is not appealed from, it must be accepted as determining the rights of the parties for the purposes of all subsequent proceedings. [P 307 C 1]

Therefore, where no appeal is filed against a preliminary decree passed under O. 34, R. 4, the points which could have been raised in that appeal if it had been filed, cannot be raised in an appeal against the final decree passed under R. 5. In other words, the correctness of a preliminary decree cannot be questioned in an appeal from the final decree. Even under the old Code a decree, under S. 88, T. P. Act, could not be questioned in the application for an order absolute under S. 89 or in an appeal from an order absolute made on such an application. [P 307 C 1]

(b) **Transfer of Property Act (1882), Ss. 88 and 89 — Application under S. 89 is application in execution—(Obiter).**

Obiter.—An application for an order absolute under S. 89 would be really an application to execute the decree passed in accordance with S. 88 and order itself would be an order in execution and not a decree. [P 307 C 1]

Weldon and M. V. Bhat—for Appellant.

Coyaji and S. S. Patkar—for Respondent.

Shah, J. — Several questions of law have been argued in this appeal, but it is necessary only to decide one of them as it is sufficient to dispose of the appeal. The facts connected with that point are briefly these. The suit out of which this second appeal has arisen, was filed on 4th June 1907 on mortgage dated 29th April 1897. The mortgagee sought to enforce his mortgage claim by sale of

the mortgaged property. A preliminary decree was passed on 30th June 1910 as contemplated by O. 34, R. 4, Civil P. C., ordering, among other things, defendants 1 and 2 to pay the mortgage amount within six months to the plaintiff and in default directing a sale of the mortgaged property. Defendants 1 and 2 failed to pay the amount, and a final decree for sale was made on 15th March 1912, apparently as contemplated by R. 5 of the same order. The present appellant, who is defendant 1, had not appealed against the decree of 30th June 1910; but he appealed to the District Court from the decree of 15th March within the time allowed by law. In that appeal he substantially raised points against the decree of 30th June 1910. It was objected in the lower appellate Court that in virtue of the provisions of S. 97, Civil P. C., the appellant could not raise any point against the preliminary decree in his appeal against the final decree of 15th March 1912. The lower appellate Court held that the appellant was precluded from disputing the correctness of the preliminary decree in the appeal preferred from the final decree.

The learned counsel for the appellant before us has questioned the correctness of this view and has urged that the present suit having been filed before the new Code came into force, the right of appeal must be held to have accrued to him under the old Code of 1882, that it could not be taken away or modified in any way by the new Code, that under the old Code there was no distinction made between a preliminary and final decree and that it was open to him in appeal from the final decree to argue the whole case according to the repealed Code. In support of the first part of this argument he has relied upon the cases of *Ratanchand Shrichand v. Hanmantrao Shivbakas* (1), *Colonial Sugar Refining Co. v. Irving* (2) and *Nana Aba v. Sheku Andu* (3), and urged that the right to appeal accrued to him within the meaning of S. 154, of the new Civil P. C., not at the date of the preliminary decree but at the date of the suit. This point is not free from difficulty though the decided cases apparently support the appellant's contention.

But assuming, without deciding in favour of the appellant, that his right to appeal accrued to him at the date of the suit and that that right is governed by the provisions of the old Code. It seems to me clear that even then his appeal to the District Court, so far as it related to the decree of 30th June 1910, would be barred. Even if the decree be treated as one falling under the old Code and the provisions of the Transfer of Property Act which were then in force, it is clear that the decree of 30th June 1910 for payment within six months would be a decree contemplated by S. 88, T. P. Act, and the order absolute for sale in default of payment would be made under S. 89 of that Act. Such an order is not referred to in S. 89 as a decree, though the first adjudication is described as a decree in S. 88. This order under S. 89 would be appealable in virtue of the provisions of S. 244 of the old Code read with the definition of the term "decree" as given in that Code. Whatever doubts there may have been on this point in virtue of the conflict of decisions as to whether an application for an order absolute for sale on default of payment by the mortgagor was one "for execution of decree" governed by Art. 179 or "to enforce judgment" under Art. 180, Lim. Act 1877, or it was an application under S. 89, T. P. Act, not subject to any period of limitation or governed by Art. 178, Lim. Act 1877, recent decisions of the Privy Council have placed the point beyond all doubt and controversy.

The cases of *Batuk Nath v. Munni Dei* (4), *Abdul Majid v. Jawahir Lal* (5), and *Munna Lal Parruck v. Sarat Chunder Mukerji* (6), in the last of which their Lordships of the Privy Council affirmed the decision of the Calcutta High Court in *Amolak Chand Parak v. Sharat Chandra Mukherjee* (7), show that an application for an order absolute would be really an application to execute the decree passed in accordance with S. 88, T. P. Act. But whether an order absolute for sale is treated as an order falling under S. 244 and appealable—

4. AIR 1914 P C 65=36 All 284=23 I C 644=41 I A 104 (P C).

5. AIR 1914 P C 66=36 All 350=23 I C 649 (P C).

6. AIR 1914 P C 150=42 Cal 776=27 I C 683=42 I A 88 (P C).

7. (1911) 38 Cal 913=11 I C 943.

1. (1869) 6 B H C R (A C J) 166.

2. (1905) A O 369=74 L J P O 77.

3. (1908) 32 Bom 337.

ble on that footing or not, it is quite clear that even under the old Code the correctness of the decree under S. 88, T. P. Act, could not be questioned in an application for an order absolute under S. 89 or in an appeal from an order absolute made on such an application. The decree under S. 88, T. P. Act, which is now called a preliminary decree under O. 34, R. 4, is the decree which must be appealed from if the party concerned feels aggrieved by it and which, if not appealed from must be accepted as determining the rights of the parties for the purposes of all subsequent proceedings. It is clear therefore that defendant 1 was precluded from disputing the correctness of the decree of 30th June 1910 in the lower appellate Court, whether his right of appeal was governed by the new Code of 1908 or the old Code of 1882. On this ground alone the present appeal must fail. The result is that the decree of the lower appellate Court is affirmed with costs.

Hayward, J. — I concur. I have no doubt that the question sought to be raised here cannot be litigated in this appeal. Even assuming that the old Code of 1882 has application, the decree of 1910 ordering payment of the mortgage money and in default sale of the property would be a decree under S. 88, T. P. Act, and the order absolute for sale of the property in default of payment of the mortgage money would be an order under S. 89, T. P. Act. If the appellant had desired to call in question the decree of 1910, he should have appealed against that decree, and he cannot now in an appeal against the subsequent order bring into question matters decided in that decree. There can be no question, in my opinion, that the latter order would be an order in execution and not a decree and would have been governed by Art. 179, of the old Lim. Act of 1877, corresponding to Art. 182 of the present Limitation Act, according to the decision of the Privy Council in the case of *Abdul Majid v. Jawahir Lal* (5). This view has been confirmed by the subsequent decision of the Calcutta High Court, holding that a similar case from the original side of that Court was governed by Art. 183 of the Schedule of the present Limitation Act. This decision was in the case of *Amolak Chand Parak v. Sharat Chandra Mukherji* (7) and was

confirmed on appeal by the Privy Council in *Munna Lal Parruck v. Sarat Chunder Mukerji* (6).

This proceeds on the assumption that the old Code of 1882 had application. The authorities quoted would certainly appear to support that contention. But it is not necessary to decide that question here, in view of the foregoing remarks and of the fact that this appeal would in any case be barred as an appeal under the new Code of 1908, being an appeal upon matters decided in a preliminary mortgage decree under R. 4 which could not be argued in appeal from the final decree for sale under R. 5, O. 34, of the Schedule by reason of the provisions of S. 97 of the present Civil P. C. This appeal must therefore be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1916 Bombay 307

BACHELOR AND SHAH, JJ.

Jivappa Tamappa Bijapur — Defendant—Applicant.

v.

Jeerji Murgeappa and another—Plaintiffs—Opponents.

Civil Extra Appln. No. 331 of 1915, Decided on 28th March 1916, from order of Dist. Judge, Bijapur, in Appeal No. 31 of 1914.

(a) Civil P. C. (1908), S. 44 — Decree of Native State is a foreign decree — S. 44 merely alters procedure of its enforcement.

The decree of a Native State coming within the purview of S. 44, Civil P. C., is not removed from the category of foreign judgments. The section merely alters the procedure by which such a judgment can have effect given to it in British India: 15 Bom 216, Ref. [P 308 C 2]

(b) Civil P. C. (1908), S. 44—British Court has power to consider whether (1) it is a valid decree (2) whether it is enforceable (3) whether Court had jurisdiction.

A Court in British India to which the decree of a foreign Court has been sent for execution has the power to consider whether it is a valid decree binding on the defendant in British India and whether it was passed with jurisdiction. The Court is not precluded from making this inquiry merely because the foreign Court has itself decided an issue upon that point in its own favour: 15 Bom 216 and AIR 1914 Bom 111, Ref.; AIR 1914 Bom 27, Expl. and Dist. [P 308 C 2]

(c) Civil P. C. (1908), S. 44 — Defendant submits to jurisdiction of foreign Court—Executing Court shall not require proof for its jurisdiction—Decree of foreign Court—

"In absentem"—Decree is a nullity and unenforceable in British India.

Where the defendant had himself submitted to the jurisdiction of the foreign Court, the executing Court should not require proof that the decree was passed with jurisdiction: 15 Bom 216, Ref. [P 308 C 2]

In a personal action, a decree pronounced by a Court of foreign State *in absentem*, the absent party not having submitted himself to its authority, is, by international law, an absolute nullity and cannot be executed against a defendant living in British India: 22 Cal 222 (PC), Foll. [P 309 C 1]

(d) Civil P. C. (1908), O. 21, Rr. 6 and 7—Dispensing with proof of jurisdiction applies to decrees of British Courts and not to foreign decrees.

Per Batchelor, J.—If Rr. 6 and 7, O. 21 be read together and in the light of the defining section, S. 2 of the Code, it is clear that R. 7 dispensing with further proof of jurisdiction than the certificate of the transmitting Court applies only to the decrees of British Court. [P 308 C 2]

Per Shah, J.—Despite the omission in R. 7, O. 21, of the words 'or of the jurisdiction of the Court' which passed it which occurred in S. 225 of the old Code, the power of the executing Court to consider the validity of the decree of a foreign Court transmitted for execution is not, in any way, altered or modified. [P 309 C 1]

G. S. Mulgaonkar—for Applicant.

A. G. Desai—for Opponents.

Batchelor, J.—In the Shimoga Court in the Mysore State the opponents obtained a personal decree *ex parte* against the present appellant in his absence. That decree was afterwards sent by the Shimoga Court to the Court of the Subordinate Judge of Bagalkot for execution. Two questions arise, first, whether it was open to the executing British Court to inquire whether the Shimoga Court's decree was passed with jurisdiction, and secondly, if it is so open, then whether the Shimoga Court had or had not jurisdiction to make this decree *in absentem* against the appellant who is a resident of British territory. In *Haji Musa Haji Ahmed v. Purmanand Nursery* (1), Farran, J., held that the Court executing a foreign Court's decree was entitled to exercise a judicial discretion as to whether it would put into force the provisions of S. 229-B, Civil P. C. of 1882. S. 229-B of that Code is reproduced in S. 44 of the present Code and deals with the power of the Governor-General in Council by notification to declare that the decrees of foreign civil Courts may be executed in British India as if they had been passed by the Courts of British India. Dealing with that

provision Farran, J., says that the section

"does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. This Court is therefore not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour."

Mr. Desai has contended that the grounds upon which Farran J's, decision was based can no longer be sustained since the change made in S. 225, Civil P. C., as re-enacted in O. 21, R. 7. For under the old S. 225 it was open to the executing Judge for any special reason to call for proof of the jurisdiction of the Court which passed the decree, while under O. 21, R. 7, which is now the law, it is not so open to the Judge. It is argued therefore that in all cases the Judge has no longer any power to investigate the question whether the Court which passed the decree had jurisdiction to do so. The argument however seems to me fallacious in the case of foreign decrees, for, if Rr. 6 and 7, O. 21, be read together and in the light of the defining section, S. 2 of the Code, it is clear that R. 7 applies only to decrees of British Courts. This view was expressed by the Chief Justice in the course of the arguments in *Harchand Panaji v. Gulabchand Kanji* (2), and the decision in this latter case seems to me to supply further support to the opinion which I am expressing. For if Mr. Desai's argument was sound, then in *Harchand's* case (2) the decision should merely have been that it was not open to this Court to question whether the Baroda Court had or had not jurisdiction to pass the decree then in question. The Court's decision however is not based upon that ground. On the contrary, the Chief Justice and my learned brother Shah determined that the Baroda Court had jurisdiction because the defendant submitted himself to that jurisdiction. This decision therefore is an instance where the Court, neglecting the argument now advanced by Mr. Desai, did in fact examine whether the foreign Court passing the

1. (1891) 15 Bom 216.

2. AIR 1914 Bom 111=39 Bom 34=26 I C 265.

decree had jurisdiction to do so. For these reasons upon the first point the decision must, in my opinion, be in the appellant's favour.

The second point admits, I think, of no doubt, for upon the facts stated it is directly governed by the Privy Council decision in the *Faridkot* case, *Gurdial Singh v. Raja of Faridkot* (3). It was there laid down that in a personal action a decree pronounced by a Court of a foreign State in absentem, the absent party not having submitted himself to its authority, is by international law a nullity. I am of opinion therefore that so far as regards the Courts in British India this decree of the Shimoga Court against the present appellant is a nullity. The result is that the order under revision must be reversed and the application for execution must be dismissed with costs throughout.

Shah, J.—I agree that the rule should be made absolute and the application for execution rejected with costs throughout. The first point in this application is whether the executing Court has power to consider the validity of the decree of the foreign Court sought to be executed in British India or not. It seems to me that under S. 44, Civil P. C., which is substantially a reproduction of S. 229-B of the Code of 1882, the Court has the power to consider that question, as it is discretionary under that section for the executing Court to proceed with the execution of the decree. Despite the omission in R. 7, O. 21 of the words "or of the jurisdiction of the Court which passed it" which occurred in S. 225 of the old Code, it appears that the power of the executing Court with reference to the decrees of foreign Courts is not in any way altered or modified. On this point it seems to me that the reasons given for the decision in *Haji Musa Haji Ahmed v. Purmanand Nursey* (1) still hold good, and that the Court is not precluded from ascertaining whether the foreign Court had jurisdiction or not. No doubt S. 225 is referred to and relied upon in the judgment. But the main ground of the decision seems to me to be independent of that section and is

not affected by the alteration in that section in the new Code.

Mr. Desai has relied upon the case of *Hari Govind Kulkarni v. Narsingrao Nouherra* (4). But in that case the decree supposed to have been transferred for execution was passed by a British Court. To such a decree undoubtedly R. 7, O. 21, would apply and the alteration already noted clearly points to the conclusion, which is accepted in the case. But that decision does not, in my opinion, justify the argument advanced by Mr. Desai that the same limitation with regard to the powers of the executing Court must be deemed to exist with reference to the decrees of those Courts in respect whereof the Governor-General in Council may have made the declaration contemplated by S. 44, Civil P. C. It is true that this point is not decided in *Harchand Panaji v. Gulabchand Kanji* (2), but the fact remains that in spite of the argument based upon O. 21, R. 7, and the case of *Hari Govind Kulkarni v. Narsingrao Nouherra* (4), the Court did consider the question as to whether the decree of the Baroda Court, which was sent to a British Court for execution, was valid or not.

It seems to me therefore that in this case the question whether the decree under execution is a valid decree binding upon the defendant in British India can be and ought to be considered. The second point relates to the validity of the decree in question, and does not present any difficulty. Having regard to the decision in *Gurdial Singh v. Raja of Faridkot* (3), it is clear that in a personal action a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is an absolute nullity. The decree in question has been obtained in the absence of the defendant, who lives in British India and is a British subject and who is not alleged to have submitted to the jurisdiction of the foreign Court. The decree under execution is therefore a nullity in British India and cannot be executed.

G.P./R.K.

Order reversed.

4. AIR 1914 Bom 27=38 Bom 194=23 I C 123.

3. (1895) 22 Cal 222=112 P R 1894=21 I A 171
=(1894) A C 670 (P C).

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BATCHELOR AND HAYWARD, JJ.

Sonu Khushal Khadake—Plaintiff—Appellant.

v.

Bahinibai Krishna and others—Defendants—Respondents.

Second Appeal No. 628 of 1914, Decided on 10th October 1915, from decision of Dist. Judge, Khandesh, in Appeal No. 231 of 1913.

Civil P. C. (1908), O. 1, R. 3 and O. 2, Rr. 2 and 3—Different alienations by one person in favour of different alienees—Validity of alienations challenged after alienor's death—Cause of action supplied by the alienation is not identical with cause of action supplied by another—Joinder of causes of action is permissible though not obligatory.

Where, on the death of a person, the question of title arises and several alienations made by the deceased on different days to different alienees are challenged in an ejectment suit by an heir of the deceased, it is open, or competent or lawful for the plaintiff to join as co-defendants various alienees who are in possession of portions or fragments of the property in suit. But it is not obligatory on such plaintiff to join all such alienees as co-defendants at the risk of forfeiting his right to recover from those whom he failed to join in the suit, inasmuch as the cause of action supplied by one alienation is not identical with the cause of action supplied by another.

[P 311 C 1]

Per *Batchelor, J.*—Where the question is, whether the causes of action in two suits are different or identical, one of the most valuable tests of this identity is that the same evidence will maintain both actions: *AIR 1914 Bom 130, Rel on.*

[P 310 C 2]

Per *Hayward, J.*—In determining questions of non-joinder and misjoinder not only should the causes of action in each case be exactly comprehended, but a clear distinction should be maintained between the permissive nature of the provisions of O. 1, R. 3, and O. 2, R. 3, and the peremptory nature of the provisions of O. 2, R. 2. Claims under separate causes of action as well as claims affecting different defendants are not contemplated by the peremptory provisions of O. 2, R. 2: *Case law discussed.* [P 312 C 1]

W. B. Pradhan—for Appellant.

G. S. Rao—for Respondents.

Batchelor, J.—This appeal is brought by the plaintiff. His suit has been dismissed by both the Courts below on the ground that it was incompetent under O. 2, R. 2, Civil P. C. The suit was brought on a sale-deed of October 1910 passed in the plaintiff's favour by defendant 1, Bahini. Bahini and Tapi were the daughters of one Tukaram Narayan who died in 1901, leaving his widow Bhagirathi and the two daughters I have named. In the year 1910, Suit No. 270 of that year was brought by

Bahini, the present defendant 1, against his sister, Tapi, the present defendant 2 and Zagdu, the present defendant 4, for possession of Survey No. 324 which had been sold to Zagdu in January 1906 by Bhagirathi. In the same month, January 1906, but a few days earlier, Bhagirathi had sold Survey Nos. 403 and 404 to the present defendant 3, Dagdu. It is found as a fact that Dagdu and Zagdu and the 3rd brother, Ukhardu, defendant 5, are joint in estate. The present suit by Bahini's vendee was to recover possession of the three Survey Nos. 324, 403 and 404. The question is, whether the lower Courts were right in holding that the suit was barred by O. 2, R. 2 of the Code. That rule provides that

"every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

In the view of the lower Courts the present claim in respect of Survey Nos. 403 and 404 was, or was to be regarded as a portion of the claim agitated in Bahini's suit of 1910 and was based upon the same cause of action. It was consequently held that since Bahini omitted to sue in respect of Survey Nos. 403 and 404 in 1910, the plaintiff was debarred from preferring his claim to those numbers in the present suit.

The question whether that decision is right, seems to me to turn entirely upon whether the cause of action in the earlier suit was identical with, or different from, the cause of action in the present suit, and I differ from the learned Judges of the Courts below because, in my opinion, the two causes of action are distinct. As was said in *Kashinath Ramchandra v. Nathoo Keshav* (1):

"the expression 'cause of action' refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour"

and

"to every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court."

Where the question is, whether the causes of action in two suits are different or identical, one of the most valuable tests appears to me to be that supplied by the authority of *Brunsdon v. Humphrey* (2) where Bowen, L.J., in delivering judgment, quoted the follow-

1. *AIR 1914 Bom 130=25 I C 73=33 Bom 444.*
2. (1884) 14 Q B D 141=53 L J Q B 476.

ing words used by De Grey,³ C.J., in *Hitchin v. Campbell* (3):

"The principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions."

And that test was applied by the Lord Justice for the decision of the particular case then before the Court. Adopting that same test here, it seems to me clear that the causes of action in the two suits were distinct. In the former suit the facts, which the then plaintiff was under obligation to prove in order to entitle her to the Court's judgment, were that on the death of her mother the property devolved upon her and that the alienation to Zagdu of Survey No. 324 was invalid. But the facts, which Bahini or her vendee, the plaintiff, would have to prove in this suit in order to recover judgment, would be not only that Bahini took the property on the death of her mother, but that the sale to Dagdu of the different Survey Nos. 403 and 404 was invalid in law, in other words, the two sets of facts which require to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and it follows, in my opinion, that the causes of action must be pronounced to be different. Mr. Rao in support of the judgment under appeal has called our attention to *Nundo Kumar Nasker v. Banomali Gayan* (4) which was cited with approval in *Umabai Mangeshrao v. Vithal Vasudeo Shetti* (5). But these decisions do not, in my opinion, conflict with the view which I have expressed. They go no further, as I understand them, than deciding that it is open or competent or lawful for a plaintiff suing in ejectment to join as co-defendants various alienees who are in possession of portions or fragments of the property in suit. They do not, I think, decide, what alone would assist the respondents here, that it is obligatory upon such a plaintiff to join all such alienees as co-defendants at the risk of forfeiting his right to recover from those whom he fails to join in his first suit: in other words, they do not decide that the cause of action supplied

by one alienation is identical with the cause of action supplied by another. Upon these grounds I am of opinion that the lower Courts were wrong in dismissing the plaintiff's claim upon the preliminary ground that it was bad under O. 2, R. 2. The decree of the lower Court must be reversed and the suit must be remanded to be heard and decided on its merits in regard to Survey Nos. 403 and 404. As to Survey No. 324 the decision of the lower Courts has not been impugned before us and will stand. Costs of the appeal will be costs in the suit.

Hayward, J.—I concur. The causes of action were, in my opinion, not the same in the two suits. The cause of action in the suit of 1910 consisted of the title arising on the death of Bhagirathi and the alleged invalidity of the sale-deed relating to Survey No. 324 in favour of Zagdu. The cause of action in the present suit of 1912 consisted of the title arising on the death of Bhagirathi and the alleged invalidity, not for present purposes of the sale-deed relating to Survey No. 324 in favour of Zagdu, but of another sale-deed relating to other Survey Nos. 403 and 404 in favour of another man, Dagdu. No doubt those two separate causes of action might have been joined together in one suit, as raising the common question of title arising out of the death of Bhagirathi and affecting to some extent each of the two different defendants, under the permissive provisions of O. 1, R. 3, of the Schedule of the Civil Procedure Code as in the cases of *Nundo Kumar Nasker v. Banomali Gayan* (4) and *Umabai Mangeshrao v. Vithal Vasudeo Shetti* (5). But that is quite another thing from holding that those two separate causes of action ought to have been joined together in one suit against the two different defendants. The two causes of action were clearly separate, because the invalidity of the sale-deed in favour of Zagdu could not have been established solely by proof of the invalidity of the sale-deed in favour of Dagdu. Nor would proof of the invalidity of the sale-deed in favour of Zagdu alone have sufficed to settle the invalidity of the sale-deed in favour of Dagdu. They could not be supported by the same evidence and that was the test adopted in the case of *Kashinath*

3. (1771) 2 W Bl 827=3 Wils 304.

4. (1902) 29 Cal 871.

5. (1909) 33 Bom 293=1 IC 120.

Ramchandra v. Nathoo Keshav (1). Moreover the two causes of action affected different defendants. There was therefore no legal necessity to join them in one suit, as neither claims under separate causes of action nor claims affecting different defendants are contemplated by the peremptory provisions of O. 2, R. 2, Schedule of the Civil Procedure Code. It would not have mattered even if the two separate causes of action had jointly affected the different defendants and had not involved a several liability of each of the two different defendants. For they would still have been beyond the contemplation of the peremptory provision of O. 2, R. 2, though within the permissive provisions of O. 2, R. 3, of the Schedule to the Civil Procedure Code.

I have ventured to add these remarks, as it seems to me essential for the proper determination of these somewhat difficult questions of non-joinder and misjoinder that not only should the causes of action in each case be exactly comprehended but that a clear distinction should be maintained between the permissive nature of the provisions of O. 1, R. 3, and O. 2, R. 3, and the peremptory nature of the provisions of O. 2, R. 2 Sch. 1, to the Civil Procedure Code.

G.P./R.K.

Suit remanded.

A. I. R. 1916 Bombay 312

BATCHELOR, AG. C. J. AND SHAH, J.

Kashibai Ramchandra Ghatge—Plaintiff—Appellant.

v.

Tatya Genu Pawar and others—Defendants—Respondents.

Second Appeal No. 128 of 1914, Decided on 10th August 1916, from decision of 1st Class, Sub-Judge, Sholapur, in Appeal No. 76 of 1911.

Hindu Law—Mitakshara school—Widow executed two simultaneous deeds—One purports the adoption of a major boy—The other gifts away certain property to a kinsman—The adoptee acquiesces in the latter deed—He cannot afterwards impeach the deed of gift as it is regarded as a family arrangement

A Hindu widow executed two documents at the same time, by one of which she adopted defendant 1 who was of full age, and by the other, which was termed a will, she devised certain property to her granddaughter, the plaintiff. The properties specified in the will were excluded from the adoption deed and the will was attested by defendant 1, his brother, a qualified pleader who acted as defendant's legal adviser and by his father. In a suit by plain-

tiff to recover property bequeathed to her from defendant's alienees, it was contended for the latter that the widow had no power to make an absolute disposition to plaintiff:

Held: that the two deeds, taken with circumstances attending their execution, constituted a family arrangement, and that the attestation of the will by defendant, who was an adult, and his acquiescence in the arrangement precluded him from impeaching the bequest to plaintiff: 27 *Mad* 577, *Ref.* [P 313 C 1]

K. H. Kelkar—for Appellant.

B. G. Rao—for Respondent.

Batchelor, Ag. C. J.—The circumstances giving rise to this appeal are these: The plaintiff is the daughter of one Nana, who was the son of Bapurao bin Vithalrao. On Nana's death, his father Bapurao took an absolute estate in the property by survivorship. Bapurao however survived his son only four days. On his death, his widow Laxmibai became entitled for a widow's estate. Bapurao before his death recommended Laxmibai to adopt defendant 1, who is Bapurao's brother's son. At the same time there was a granddaughter, the present plaintiff, to be provided for. Thus at one and the same time Laxmibai by two documents made the adoption of defendant 1 and also executed what is termed a will devising certain property to the plaintiff. Defendant 1 did not appear at the trial of the suit and the contesting defendants now are alienees from defendant 1. In the Court of first instance, Mr. V. P. Raverkar, in a careful judgment decreed the plaintiff's suit. That decree was reversed on appeal to the first class Subordinate Judge, Mr. Kaneker. But of his judgment it will be enough to say that no one before us has relied upon it, and it has appeared extremely difficult to extract from it any intelligible principle.

The question before us is whether the plaintiff is entitled to the property that she claims. The claim in the plaint is based upon the provisions of the will of Laxmibai. But in reality what we have to consider and determine is the effect of the two contemporaneous documents executed on 10th June 1895 in the presence of many witnesses. It appears to me indisputable that these two documents must be read together and that so read, they constitute a single family arrangement disposing of the properties to which they refer. Certain of those properties are specified in the instrument in the plaintiff's favour, while the

others are similarly specified in the deed of adoption of defendant 1. In this latter deed it is made quite clear that defendant 1 as the adopted son of Bapurao bin Vithalrao will be entitled, not to the whole property of his adoptive father, but only to that particular portion of it which is described in the document. The will in favour of the plaintiff is attested by defendant 1, by his father, and by his brother, that brother being a qualified pleader, who was defendant 1's legal adviser in these transactions. It must therefore, in my opinion, be inferred that defendant 1, who was then of full age, deliberately accepted this family arrangement, and that he took the advantage which the arrangement conferred upon him. That being so, it appears to me that in this appeal we are not concerned with that class of cases which consider the position when a bargain made between the adopting widow and the guardian of an adopted infant diminishes the estate which the adopted son would otherwise take. The essential fact here is that the adoptee at the time of his adoption was of full age. There appears no particular authority in which the legal position of such an adopted son is formally considered, but in *Visalakshi Ammal v. Sivaramien* (1) Sir Subramania Ayyar, Offg. C. J. and Benson, J., in making the reference to the Full Bench expressed the following opinion upon the point:

"Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent."

This expression of opinion favours the view which I am taking that defendant 1 having deliberately accepted the family arrangement and its advantages must now be held to it. It appears to me no answer to say that the widow Laxmibai was not empowered to bequeath her husband's property to the plaintiff, and that if she had no such power in law, she certainly did not obtain it by reason of the adoption. It must be admitted that Laxmibai had no such power. But the disposition in the plaintiff's favour seems to me to be good, not because it was a bequest by

1. (1904) 27 Mad 577 (F B).

Laxmibai, but because it was part of the single family arrangement which all the parties accepted, including defendant 1. The ground of the plaintiff's successful claim seems to me, in other words, to be, not Laxmibai's will, but that of which this will is evidence, namely, the family arrangement. Mr. Rao has called our attention to the well-known decision of their Lordships of the Privy Council in which it was laid down that the mere attestation of a document must not be taken to import any concurrence in the provisions of that document. But our decision is far from infringing this pronouncement. For in this case we have, in order to prove defendant 1's acquiescence in the arrangement, not only the attestations of himself and his legal adviser on Laxmibai's will, but also the more eloquent fact that he was content to accept the deed of adoption, which in terms restricted the property to which he was entitled. On these grounds it appears to me that the trial Court's decision is right, and that the plaintiff under the arrangement made is entitled to the property which she claims. I would therefore reverse the decree under appeal and restore that of the Subordinate Judge of trial with costs throughout.

Shah, J.—I agree.

G.P./R.K.

Decree reversed.

A. I. R. 1916 Bombay 313

SCOTT, C. J. AND HEATON, J.

Emperor

v.

Khalpa Ranchod—Accused.

Criminal Confirmation No. 11 of 1916, decided on 14th June 1916, against conviction and sentence of Political Agent, Mewas Estates, West Khandesh.

Criminal P. C. (1898), S. 428—S. 4, R. 44, Act 11 of 1846, empowers High Court to entertain appeal of accused convicted by Agent Mewas Estates—And to obtain additional evidence if necessary—Criminal P. C., S. 428.

Section 4, Act 11 of 1846, combined with R. 44 of the rules made under the Act, empowers the High Court to entertain the appeal of an accused person convicted by the Agent of Mewas Estates in West Khandesh and, if necessary, to resort to the provisions of S. 428, Criminal P. C., for the purpose of obtaining any additional evidence that may be necessary. [P 315 C 1]

S. S. Patkar and *Government Pleader*—for the Crown.

S. R. Gokhale—for Accused.

Judgment.—We have before us a reference by the Political Agent of Mewas Estates in West Khandesh in which we have to decide whether a sentence of death passed by the Agent upon the accused should be confirmed. We have also before us an appeal by the accused against the sentence. The accused is stated to be a resident of Boripada in the Nala State, taluka Taloda, District West Khandesh, and the murder is said to have been committed at Boripada, Nala State, and the charge is framed accordingly.

The question is whether the Agent for the Mewas Estates has jurisdiction in the case of a murder committed at Boripada. Act 11 of 1846 recites that whereas it has been deemed expedient to exempt from the jurisdiction of the civil and criminal Courts of the Bombay Presidency certain portions of the Purganas of Nandurbar, etc., in the Province of Khandesh, it is enacted that so much of Appendix A, Regn. 29 of 1827 of Bombay Code, as declares the villages contained in the schedule annexed to the Act, and the lands attached thereto (being parts of the Purganas of Nandurbar, etc.), subject to the Regulations established for the administration of civil and criminal Justice in the Bombay Presidency, be repealed; and it is enacted that from and after the said day the administration of civil and criminal justice, the superintendence of the police, etc., shall vest in such Agent to the Governor of Bombay as shall be appointed by the Governor of Bombay in Council, and it shall be competent to the Governor in Council, by an order in Council, to prescribe such rules as he may deem proper for the guidance of the agent aforesaid and of all the officers Subordinate to his control and authority, and to determine to what extent the decision of the Agent in civil suits shall be final, and to define the authority to be exercised by the Agent in criminal trials, and what cases he shall submit to the decision of the Sudder Foudaree Adawlut; and it is enacted by S. 4 that upon the receipt of any criminal trial by the Agent under the rules which may be prescribed by the Governor in Council, the Sudder Foudaree Adawlut, shall proceed to pass a final judgment or such other order as may after mature consideration seem to the Court requi-

site and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge.

Now the villages described in the schedule include as belonging to the Chief, styled Oomed walad Pacha Parvee of Nal, an uninhabited village of Nal and certain other uninhabited villages and the inhabited village of Goolyamba. There is no mention of any village of Boripada. The next legislation which affects the district in charge of the Political Agent of the Mewas Estates is Act 14 of 1874, which repealed Act 11 of 1846 but provided that all rules theretofore prescribed by the Governor-General in Council or the Local Government for the guidance of officers appointed within any of the Scheduled Districts for all or any of the purposes mentioned in S. 6 and in force at the time of the passing of the Act, shall continue to be in force, unless and until the Governor-General in Council or the Local Government, as the case may be, otherwise directs; and Part 2 of the schedule to that Act includes the villages of the following Mewasi Chiefs, the Parvi of Nal and other Chiefs. That brings us to the rules made under Act 11 of 1846. Rr. 35, 37 and 44 are the relevant ones in this connexion. R. 35 provides that:

"the absolute jurisdiction of the agent in criminal cases shall extend to fine and imprisonment for five years, with or without hard labour; and sentences involving a punishment beyond that period, or of greater severity, must be submitted for the confirmation of the Sudder Foudaree Adawlut."

Rule 37 provides that :

"the agent will obey all injunctions and orders of the Sudder Foudaree Adawlut, and will return processes duly executed as required by that Court, and will forward from time to time such periodical or other returns as may be called for by the Judges of the Sudder Foudaree Adawlut."

Rule 44 provides that :

"the Sudder Foudaree Adawlut shall be empowered to call for the agent's proceedings in any case, on petition being made to that Court by any party against whom a sentence may have been passed by the agent, and the Sudder Court may hereafter proceed according to the provisions of S. 4, Act 11 of 1846."

Now S. 4, Act 11 of 1846, as has already been shown, provides that the Sudder Foudaree Adawlut, on the receipt of any criminal trial referred by the Agent, should proceed to pass a final judgment, in the same manner as if the trial had been sent up in ordinary

course from a Sessions Judge. That provision, taken in conjunction with the R. 44, which permits of a petition being made by a party against whom a sentence has been passed by the Agent, appears to us to permit the High Court to entertain the appeal of the accused, and if necessary, to resort to the provisions of S. 428, Criminal P. C., for the purpose of obtaining any additional evidence that may be necessary.

[The High Court directed the Sessions Judge of Dhulia under S. 428, Criminal P. C., to take additional evidence on the point whether the village of Naripada was within the jurisdiction of the Agent. The Sessions Judge took evidence and found that the village was within the jurisdiction of the Agent. The High Court thereupon considered the case on the merits and sentenced the accused to transportation for life.—*Ed.*]

G.P./R.K. *Sentence modified.*

A. I. R. 1916 Bombay 315(1)

BEAMAN AND HEATON, JJ.

Kavasji Sorabji Aibada—Appellant.

v.

Bai Dinbai—Respondent.

First Appeal No. 44 of 1916, Decided on 8th August 1916, from decision of Dist. Judge, in Misc. Appln. No. 77 of 1915.

Will—Probate—Executor called upon by citation to accept or renounce; if accepts can be compelled to take probate within a limited time—If he fails Letters of Administration with a copy of the will may be granted to a competent person.

An executor called upon by citation to accept or renounce is compellable, if he accepts, to take out probate within a limited time. If he does not do so Letters of Administration with a copy of the will annexed may be granted to any competent applicant. [P 315 C 1]

G. N. Thakor—for Appellant.

K. N. Koyajee—for Respondent.

Judgment.—An executor called upon by citation to accept or renounce is clearly compellable if he accepts, to take out probate within a limited time. If he does not do so, Letters of Administration with a copy of the will annexed may be granted to any competent applicant. This is the principle of the decision in the cases of *Motibhai v. Kar-sandas Narayandas* (1) and *Dayabhai Tapidas v. Damodar Tapidas* (2). The

lower Court has decided this as a preliminary point against the applicant and decided it wrongly. There is a further question of fact to be answered. The opponent denies that the applicant is a beneficiary under the will or has any interest whatever in the estate of the deceased. If that be so, he would clearly have no locus standi in any such proceedings as these. But that question must be dealt with by the learned Judge below. We set aside his order and remand the application to be disposed of in accordance with the foregoing observations. Costs to abide the result.

G.P./R.K.

Order set aside.

A. I. R. 1916 Bombay 315(2)

SCOTT, C. J. AND HEATON, J.

Gani Latif and others—Plaintiffs—Appellants.

v.

Manilal Mulji and others—Defendants—Respondents.

Original Civil Appeal No. 52 of 1915, Decided on 20th January 1916, against judgment of Macleod, J.

Contract—Construction—Contract for sale of goods—Defendants liable under contract for immediate despatch of goods ordered which were at their possession and for balance intimation was to be given to plaintiffs of their probable arrival who were not to refuse for delay—Defendants vendors having discretion to send or not to send every single article out of those mentioned in order—Large quantity of goods ordered—Defendants expressing inability to comply with order owing to war conditions—Suit for damages—As soon as plaintiffs placed orders contract became binding—Contract not indefinite by reason of omission of maximum limit of purchase—Court can refuse damages for large and unreasonable orders—Defendants were not entitled to refuse altogether to perform order received.

Plaintiffs, a firm carrying on business in Bombay and Ellichpur, contracted with defendants, merchants in Bombay, for the purchase of alizarine dyes. On 25th April 1914, the plaintiffs executed a document whereby they agreed to place all their orders with defendants for alizarine dyes at a specified rate. A varying scale of discount was allowed up to a purchase of 300 drums. On the back of the document were noted the defendants' conditions signed by their agent. One of them was that the defendants were responsible for the immediate despatch of goods ordered which were in their godown and as to the balance, intimation was to be given to plaintiffs of their probable arrival who should not refuse to purchase on the ground of delay. The last condition was that the goods were to be credited according to the date of despatch mentioned in the

1. (1895) 19 Bom 123.

2. (1896) 20 Bom 227.

railway receipt and the vendors were to have the discretion to send or not to send every single article out of those comprised in the order. In pursuance of this agreement the plaintiffs ordered from the defendants on various dates 36 casks of alizarine paste which were all duly despatched. Subsequently further orders were placed for large quantities of the same commodity. The defendants expressed inability to comply with these orders owing to conditions created by the war. Plaintiffs thereupon instituted the present suit for Rs. 71,400 for damages, being the difference between the contract rate and the market price of the goods. The trial Judge, Macleod, J., held that the omission to fix in the contract the maximum limit of purchase rendered the contract indefinite and unenforceable and that the condition giving the vendors freedom to send or not to send any articles out of those ordered was fatal to the plaintiff's claim. On appeal:

Held: (1) that on a proper construction of the written document, as soon as the plaintiffs placed an order with defendants, there was a binding contract for the supply of goods mentioned in the order but, until such order was received, it was open to the defendants to withdraw from the transaction by giving notice to the plaintiff: *Offord v. Davies*, (1862) 12 C B (n s) 748; *Great Northern Railway Co. v. Mitham*, (1877) 9 C P 16 and 24 Bom 97, *Ref.* [P 316 C 2]

(2) that the contract was not indefinite by reason of the omission of the maximum limit of purchase and that it was open to Courts to reject dishonest claims for damages based on alleged failure to comply with large and unreasonable orders: *In re Gloucester Municipal Election Petition, Ford v. Newth*, (1901) 1 K B 683 and *Reg. v. Demers*, (1900) A C 103, *Ref.* [P 317 C 1]

(3) that the last condition of the contract was not applicable to the order for hermetically sealed drums of one uniform quality, and that it did not empower the defendants to refuse altogether to perform an order which they had received. [P 317 C 1]

Setalvad, Kanga and Jinnah—for Appellants.

Desai and Inverarity—for Respondents.

Scott, C. J.—The claim made by the plaintiffs is for damages for non-delivery of 254 casks of alizarine dyes which the plaintiffs at Ellichpur had ordered from the defendants in Bombay.

Exhibits A and B are signed by the plaintiffs' and the defendants' agent respectively and sufficiently evidence the terms agreed to by the parties. The plaintiffs agreed to purchase goods on the conditions at the back of Ex. A, and the defendants by their agent agreed to the transaction, or *sauda* as it is called in Ex. B. The plaintiffs in Ex. A agree not to purchase alizarine goods from any other person nor to sell to any other person, while the defendants agree not

to send their sun brand goods of alizarine to any merchant at Ellichpur other than the plaintiffs. The conditions include a shifting scale of commission or discount to be allowed upon the agreed rate of 7 annas and 9 pies per pound, net rate, Bombay godown delivery, the discount varying according to the amount which should be purchased up to 300 drums in the course of a year. On the back of the document, which is a printed form filled in certain parts in manuscript, the conditions are stated upon which the defendants are prepared to supply the goods. The first condition is that on an order reaching the office as to the goods out of the same which may be ready in the godown the same will be sent, and as to the remaining goods, intimation will be given of their arrival. On receiving the order, as to the goods which may not be ready, the merchant is to be responsible for taking the whole of such goods, notwithstanding the period which may have elapsed, provided he does not ask after twenty days that the goods should not be sent. The last condition provides that the goods will have to be credited according to the date of despatch mentioned in the railway receipt and the sellers shall have discretion or liberty to send or not to send every single article out of those comprised in the order.

The document, Ex. A, even when read with Ex. B, does not impose any obligation upon the plaintiffs to take any specific quantity of goods and the quantity to be sent could only be ascertained as soon as the plaintiffs had sent an order for some of the goods. As soon as the order was received by the defendants, there would be a binding contract for the supply of goods mentioned in the order, but until such an order was received, it would be open to the defendants to withdraw from the transaction by giving notice to the plaintiffs. That we take to be clear upon the authority of *Offord v. Davies* (1); *Great Northern Railway Co. v. Witham* (2); *Bengal Coal Co. Ltd. v. Homee Wadia & Co.* (3). The learned Judge of the lower Court has however apparently taken a different view, for in his judgment he states:

1. (1862) 12 C B (n s) 748.
2. (1877) 9 C P 16.
3. (1900) 24 Bom 97.

"If the writing of 25th April had stated that the plaintiffs agreed during twelve months to purchase from the defendants up to 300 casks of this particular dye, it might be said that the defendants by accepting the document had created a continuing offer whereby they pledged themselves to accept any order from plaintiffs up to 300 casks during the twelve months at the rate mentioned, and it has been contended that that is the effect of the document. As far as I can see, one important item which should have been mentioned in the document of 25th April, viz., the actual number of casks up to the limit of which the plaintiffs might send orders, has been omitted. . . . It may be that the parties thought that they specified in the writing the limit up to which the plaintiffs might send orders, but the Court is not concerned with what the parties thought they were doing. It is only concerned with what the parties have actually done. So owing to these omissions the writing is so indefinite in its terms that no effect can be given to it."

It does not appear to us that the omission of the maximum which might be ordered is any reason for not giving effect to the terms of Ex. A, provided any order has in fact been given. It might be that an order on a document not limited as to amount, as the learned Judge held this document to be, might be so large as to be utterly unreasonable, and have been sent merely for the purpose of creating a dishonest claim for damages, but such a case could easily be disposed of by the Court if it arose and the fact of such a possibility would be no reason for not giving effect to any bona fide orders sent according to the terms of the document. It may be observed that in the case of tender, for instance, *Great Northern Railway Co. v. Mitham* (2); *In re Gloucester Municipal Election Petition*, *Ford v. Newth* (4) and *Reg. v. Demers* (5), the tender which created a continuing offer was in no case limited in amount, but that was not held to be a reason for not giving effect to the terms of the document.

The learned Judge having come to the conclusion that Ex. A was so indefinite, for the reason stated, that it could not be given effect to, dismissed the suit, and, if that reason is good, it was sufficient to justify the dismissal. Consequently the proceeding upon which the trial had taken place came to an end. That proceeding was a summons for inspection in order that the plaintiffs might be able to ascertain from the documents in the possession of the de-

fendants the amount of the different orders which they had sent for execution to the defendants under the document of 25th April, subsequent to the first order of 36 drums which had been executed, and the extent to which the defendants were able to comply with such orders. The learned Judge also held that the plaintiffs' case must fail by reason of the term of Cl. 5 of the conditions on the back of Ex. A. He held that that conditions enabled the defendants to say on receipt of the order that they do not choose to send the goods. It appears to us that that is reading a condition inserted for the benefit of the defendants far too strictly against their opponents. The condition must, if possible, be read as a whole and reconciled, and such a reading of condition 5 appears to us to be inconsistent with condition 1 which is that on the order reaching the office the goods which are ready in the godown are to be sent. Again it would be difficult for us to adopt the sweeping interpretation of the lower Court with regard to condition 5, even if it stood alone, for the first line of the condition is that the goods will have to be credited according to the date of despatch in the railway receipt, so it assumes a performance of the order at all events to some extent. Then it proceeds to mention the discretion or liberty which is retained by the defendants, and the words indicating the discretion commence:

"Order me se" (* * * *), i. e., 'out of the order' the defendants are to have a discretion to send or not to send "hur ek chij" (* * *) 'every single thing.'"

The condition appears to us to be more appropriate to an order for alizarine dyes put up in tins and packed in boxes from which certain tins might be abstracted or certain tins of a particular colour might not be inserted and to be less appropriate to a contract for hermetically sealed drums of alizarine paste of one uniform colour, such as the goods the subject of the document of 25th April. But however that may be and even conceding that in a proper case the condition 5 might apply to an order for drums of alizarine paste, we do not think that it can be read as importing a power in the defendants to refuse altogether to perform an order which they

4. (1901) 1 K B 683.

5. (1900) A C 103.

have received. It is also to be observed that the defendants have undertaken to perform the plaintiffs' order or orders of August as soon as the goods arrive. That appears from their letter of 13th August, and again from their letter of 29th August. With reference to the order of the 8th they say: "We shall send the goods when the steamer arrives." Again in their letter of 29th August, referring to a letter of which the date is not given, they say: "On arrival of the steamer we will send the casks to you." They could hardly after making that promise on the receipt of the order, refuse execution on the ground that although they had the casks arrived freshly from Europe, they did not care to perform the order.

We are therefore of opinion that the grounds upon which the suit was dismissed cannot be supported, and the decree must be set aside as also the order discharging the summons. We remand the case for disposal to the lower Court. Defendants must bear their own cost of the hearing before Macleod, J., and of this appeal. Plaintiffs' costs, costs in the cause.

G.P./R.K.

Order accordingly.

A. I. R. 1916 Bombay 318

SCOTT, C. J. AND HEATON, J.

Bai Diwali and others—Defendants—Appellants.

v.

Umedbhai Bhulabhai Patel—Plaintiff—Respondent.

Civil Appeal No. 27 of 1915, Decided on 16th June 1916, against order of Joint Judge, Ahmedabad, in Appeal No. 48 of 1913.

(a) Civil P. C. (5 of 1908), S. 11, Expl. 4—*Res judicata*—Plaintiff's claim for possession was really a claim in virtue of his purchase of the mortgagee's rights—So a decision on this point is not *res judicata* in a suit for the recovery of the mortgage money.

In 1896, the father of defendants 1 and 2 purported to mortgage to one R an unrecognized share of a bhag, contrary to the provisions of the Bhagdari Act. The mortgage-deed provided that, after possession by the mortgagee for eleven years, the mortgage amount was to be paid to him, whenever he should demand it, either out of the property or by the mortgagor or his heirs personally. R obtained possession of the land under the professed mortgage and subsequently his rights were purchased by plaintiff at a Court sale. [P 319 C 2]

(b) Contract Act (9 of 1872), S. 24—*Consideration being unlawful agreement was void and a suit for repayment must be*

brought within three years—Art. 62, Lim. Act (9 of 1908).

In 1910 plaintiff filed a suit for possession of the land against the representatives of R and of the mortgagor, in which no claim was made for payment of the amount of the mortgage-debt, nor was it alleged that any demand had been previously made. The suit was dismissed on the ground that the mortgage was invalid and unenforceable.

In 1911 plaintiff brought the present suit to recover the amount of the mortgage-money from the estate of the deceased mortgagor, and, in the alternative, to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee :

Held : (1) that the claim was not barred by *res judicata*, inasmuch as (a) the claim for possession was not really a claim on the mortgage, but a claim by virtue of the purchase by the plaintiff of the mortgagee's rights and (b) at the time of the suit of 1910 his right had not matured, because no demand had been made since the expiry of the eleven years mentioned in the deed; (2) that the claim was barred by Art. 62, Lim. Act, inasmuch as the consideration being unlawful, the mortgage and the agreement to pay contained therein were void according to S. 24, Contract Act, and the mortgagee's right was to claim repayment of money advanced to the mortgagor within three years of the date of the mortgage-deed, as money had and received. [P 319 C 1,2]

G. N. Thakor—for Appellants.

T. R. Desai—for Respondent.

Judgment.—In 1896 Kalidas Hari-bhai, father of the first two defendants, purported to mortgage to Ranchhod Madhudas, whose representative defendant 3 now is, an unrecognized share of a bhag or the narva, contrary to the provisions of the Bhagdari Act. Such mortgage by reason of those provisions was void *ab initio*. The mortgage-deed provided that after possession by the mortgagee for 11 years the mortgage amount was to be paid to him, whenever he should demand it, either out of the property or by the mortgagor or his heirs personally. Ranchhod under the professed mortgage obtained possession of the land, and subsequently his rights under the mortgage claim were sold and purchased by the plaintiff at a Court-sale. In 1910 the plaintiff filed a suit against the representative of Ranchhod and also against the representatives of the professed mortgagor to obtain possession from the representative of Ranchhod of the property then in his possession. No claim was made in that suit for payment of the amount of the so-called mortgage-debt, nor was it alleged that any demand had been previously made. The suit failed on the ground that the mortgage was invalid, and

therefore unenforceable, and the plaintiff as the purchaser of the mortgagee's claim, could get no relief from the Court. The present suit was filed in the following year to recover the amount of Rupees 788-7-0 from the estate of the deceased mortgagor, and, in the alternative, if that should not be allowed, to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee. The learned Subordinate Judge rejected the plaintiff's claim except in so far as he claimed in the alternative to recover Rs. 577 from the estate of the holder of the decree against the deceased mortgagee. An appeal was preferred to the Joint Judge who has held that the money claim is enforceable under the mortgage-deed and has therefore remanded the case for trial to the lower Court. The question is whether that decision is correct or not.

It is first contended that the plaintiff's claim is inadmissible by reason of the law of *res judicata*, and it is contended that in the suit of 1910 the plaintiff should have claimed the amount of the mortgage-debt which he claims in the present suit and having failed to do so, he is barred on the footing that he might and ought to have claimed in that suit. We are of opinion that this argument should not prevail. The claim for possession was not really a claim on the mortgage, but a claim by virtue of the purchase by the plaintiff of the mortgagee's rights. The mortgagee was then in possession, and the plaintiff merely sought to stand in his shoes, but not to exercise against the mortgagee any new rights under the mortgage-deed. Moreover at the time of the suit of 1910 his right according to the terms of the mortgage-deed had not matured, because no demand had been

made since the expiry of the 11 years mentioned in the deed. Therefore no cause of action for the debt had arisen, and upon the evidence which was available in the suit of 1910, and which was relevant to the suit of 1910, he had no occasion to sue for the payment of the mortgage-money. Therefore it cannot be said that he might and ought to have put forward the present claim in that suit.

The second objection is an objection based upon the Indian Limitation Act and is of a more serious character. The learned Judge in discussing the question of limitation observes that the mortgage-deed is dated 19th May 1896. 11 years expired on 19th May 1907 and the suit was brought on 20th September 1911 within the six years from the date of the cause of action accruing under the registered mortgage-deed, and therefore he held that the suit was not time-barred. We are of opinion that the learned Judge was in error. According to S. 24, Contract Act, the consideration or part of the consideration being unlawful the mortgage-deed was void, and the agreement contained in the mortgage to pay the mortgage debt was void. That being so, the consideration failed *ab initio*, and the mortgagee's right was as held in *Javerbhai Jorabhai v. Gordhan Narsi* (1), to claim repayment of the money advanced to the mortgagor within three years of the date of the mortgage-deed as money had and received, but after three years by reason of Art. 62, Lim. Act, his remedy was barred. For these reasons we set aside the order of the Joint Judge and restore that of the Subordinate Judge with costs throughout on the plaintiff.

G.P./R.K.

Appeal allowed.

1. AIR 1915 Bom 102=39 Bom 358=28 IC442.

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